No. 93-56682

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXIS BARRERA-ECHAVARRIA,

Petitioner-Appellee,

v.

RICHARD H. RISON, Warden,

Respondent-Appellant.

BRIEF OF AMICI CURIAE, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, IN SUPPORT OF PETITIONER-APPELLEE

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QUESTION PRESENTED

Does the confinement of an excludable alien, who is not serving a sentence and who cannot be returned to his country of origin, in a maximum security federal penitentiary for nearly nine years amount to punishment in violation of the Fifth and Sixth Amendments to the United States Constitution?

INTEREST OF AMICI CURIAE

Amici curiae are national organizations dedicated to improving the criminal justice system. Amici offer their expertise to this Court on the issue of punishment.

The National Legal Aid and Defender Association ("NLADA") is a private, non-profit, national membership organization, founded in 1911. Its purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to afford to retain counsel. The NLADA represents approximately 3,000 offices that provide civil and criminal legal services to poor people. The membership of the NLADA comprises most public defender offices and legal services agencies around the nation, and also includes assigned counsel and other private practitioners. The NLADA is vitally interested in protecting the fundamental rights of

poor persons. The organization is concerned that overturning the district court's order in this case would permit the government to by-pass the criminal justice system and to incarcerate many poor people without a trial.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation. It was founded over twenty-five years ago to promote, study and advance the knowledge of criminal law, and to encourage the integrity, independence and expertise of defense lawyers. The NACDL has over 7,000 regular members and over 25,000 affiliate members. Among the NACDL's objectives is to promote the proper administration of criminal justice. The NACDL is greatly troubled by the government's position, which seeks to undermine the constitutional right of all people not to be imprisoned except upon criminal charges that are brought and proved. The government's position, if accepted by this Court, would also diminish basic human rights that apply in administrative proceedings.

The California Attorneys for Criminal Justice ("CACJ") is a non-profit corporation, founded in 1972. CACJ has over 2,700 dues-paying members, primarily criminal defense lawyers. One of the principal purposes of the CACJ, as set forth in its Bylaws, is to protect and insure the individual rights guaranteed by the Federal Constitution, and to resist efforts

to curtail these rights. The CACJ is concerned that permitting indefinite incarceration in a maximum security prison, without a trial, would repose too much power in the hands of government officials.

STATEMENT OF FACTS RELEVANT TO THIS BRIEF

Alexis Barrera-Echavarria is a Cuban citizen who emigrated to the United States as part of the "Mariel boatlift" of 1980. See Memorandum of Opinion and Order Granting Barrera's Petition for a Writ of Habeas Corpus ("Memorandum") at 1; Excerpts of Record for Respondent-Appellant ("ER") at 238. Soon after his arrival in the United States, Mr. Barrera was released from the custody of the Immigration and Naturalization Service ("INS") on immigration parole, pursuant to 8 U.S.C. § 1182(d)(5)(A). See Memorandum at 3; ER at 240. Between 1981 and 1983, Mr. Barrera was convicted of three crimes: armed robbery, burglarizing an unoccupied business, and retail theft. Id. As a result, the INS revoked Mr. Barrera's immigration parole. Id. Mr. Barrera finished his state sentences and came into INS custody in February 1985. See INS Parole Denial; ER at 31; Memorandum at 3; ER at 240. Shortly thereafter, Mr. Barrera was ordered excluded from the United States. See Decision of the

Immigration Judge; ER at 30. However, the INS has been unable to deport Mr. Barrera and the INS has therefore imprisoned him almost continually since February 1985, even though he is not serving a sentence for any crime. See Memorandum at 3, 15; ER at 240, 252. This appeal is being argued in February 1994, which will mark the ninth anniversary of the date Mr. Barrera came into INS custody.

The INS has released Mr. Barrera only once in nine years. On January 21, 1992, the Service placed Mr. Barrera on immigration parole and sent him to a halfway house. See Memorandum at 4; ER at 241. In June 1992, the INS revoked Barrera's parole after he was arrested for allegedly sexually assaulting another resident of the halfway house. Id. Barrera was charged with burglary and sodomy by force, but these charges were dropped by the district attorney for lack of evidence. Id.[1] There is no indication that the charges will ever be refiled. See Memorandum at 4-5; ER at 241-42.

Although there was insufficient evidence to prosecute Mr. Barrera for a criminal offense, the government has asserted that the alleged incident provides a sufficient justification

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[1] The alleged assault victim was not competent to testify. See Memorandum at 4; ER at 241. In addition, the government's case against Mr. Barrera was quite weak: following a medical examination of the alleged victim, the government's medical examiner found no physical evidence to corroborate that an assault had even occurred; further, a search of the halfway house did not discover the knife allegedly used in the alleged offense. Id. at 5, n.4; ER at 242 n.4.

to incarcerate Mr. Barrera in a maximum security prison. Most recently, the alleged incident was the only reason given by the INS in denying Mr. Barrera his release on immigration parole. See Final Notice of Parole Denial, dated Feb. 3, 1993; ER at 209. Since 1985, the INS has held Mr. Barrera in a variety of maximum security prisons.[2] He is currently incarcerated at the United States Penitentiary at Leavenworth, Kansas. See Petitioner-Appellee Barrera's Opposition to the "Government's Emergency Motion to Stay District Court Order" (filed in this Court on December 21, 1993) at 4.

The federal penitentiary at Leavenworth opened in 1906; it is the oldest prison in the federal system. See Federal Bureau of Prisons, Facilities 1991 32 (reprinted at App. 2 to this Brief). It has 4 cellblocks, one of which has been used to house Mariel Cuban "detainees." Id. The shoebox-shaped cellblocks contain five tiers of five-and-a-half by nine-foot cells. See Pete Earley, The Hot House: Life Inside Leavenworth Prison 25-26 (1992) (App. 3-4). A photograph of a

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[2] When Mr. Barrera filed his habeas corpus petition, he was held at the United States Penitentiary at Lompoc, California, a maximum security prison. See Petition for a Writ of Habeas Corpus at 3; ER 56. After his parole was revoked in 1992, the INS has incarcerated Mr. Barrera at several facilities, including the Nevada State Prison, the U.S. Penitentiary at Terre Haute, Indiana and, most recently, Leavenworth. See Declaration of John Castro, dated January 26, 1993, at 3; ER at 199 (Nevada State Prison); Declaration of Tomas Curi, dated June 1, 1993, at 6; ER at 218 (Terre Haute); Petitioner-Appellee Barrera's Opposition to the "Government's Emergency Motion to Stay District Court Order" (filed in this Court on December 21, 1993) at 4 (Leavenworth).

cellblock that has been used to house Cuban "detainees" is reproduced in the Appendix to this Brief, at page App. 10.

Mr. Barrera is an INS "detainee." Other than "detainees" like Mr. Barrera, the Leavenworth penitentiary holds inmates serving lengthy federal sentences. Id. at 27; App. 5.[3] The sentenced inmates at Leavenworth are considered to be among the most dangerous criminals in the United States. Id. at 26; App. 4. Sentenced inmates "earn" their way to Leavenworth; they are transferred there because the Bureau of Prisons is unwilling to hold them in a less secure prison. Id. at 27-28; App. 5-6.[4] Leavenworth is one of the places where the Aryan Brotherhood has flourished. Id. at 80. Leavenworth is where the Bureau of Prisons holds convicted murderers like Thomas Silverstein, who has been found guilty of killing an inmate and a correctional officer while in prison. Id. at 121-27.

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[3] The average sentence length for a sentenced inmate at Leavenworth is 39.5 years. Id. (citing Bureau of Prisons' statistics).

[4] USP Leavenworth is the only high security facility in the Bureau of Prisons' North Central Region (except for Marion, which only accepts inmates after individual approval from the Bureau's regional director). See U.S. Bureau of Prisons, Program Statement 5100.03 (Security Designation and Custody Classification Manual, dated Jan. 31, 1991), at 3-12. Sentenced inmates are assigned to a Bureau of Prisons' facility after a careful assessment of their security needs, calculated on a point scale. Inmates are only considered to merit high security placement if (a) they are a part of a special "security threat group"; (b) they have to serve a life sentence or a non-parolable sentence in excess of 45 years; or (c) they score 18 points or more on the Bureau's point scale. Id. at 8-28 (Security Designation Table).

Leavenworth is also where Mr. Barrera has been sent for what the INS terms "the nonpunitive legislative purpose of protecting the public welfare." See Brief for Respondent-Appellant ("Government's Brief") at 26.

ARGUMENT

I. THE GOVERNMENT MAY NOT PUNISH EXCLUDABLE ALIENS WITHOUT A CRIMINAL TRIAL; KENNEDY v. MENDOZA-MARTINEZ DETERMINES WHEN A SANCTION CANNOT BE IMPOSED WITHOUT A CRIMINAL TRIAL.

For over 200 years, imprisonment has been considered a form of punishment in this country.[5] It is reserved for only the most serious of cases and for only the most dangerous of offenders.[6] This appeal concerns the imprisonment of an

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[5] See also infra at section IIC1, for a discussion of the history of imprisonment in this country.

[6] Thus, in the Sentencing Reform Act of 1984, which established the United States Sentencing Commission, Congress directed the Commission to assure that its guidelines provide for imprisonment for defendants with a history of violent felony convictions; Congress also directed the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment" for first-time offenders who have not been convicted of violent or other serious offenses. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 2021-22 (codified at 28 U.S.C. §§ 994(i,j)); see also Sen. Rep. No. 98-225 at 59, reprinted in 1984 U.S. Code Cong. and Admin. News 3242 ("the only type of sentence for which current law provides a full range of options is the term of imprisonment. This probably results in too much reliance on terms of imprisonment when other types of sentences would serve the purpose of sentencing equally

excludable alien, who is not serving a criminal sentence. This Court must decide whether the executive branch of our government has the unilateral power to imprison an excludable alien -- in a maximum security prison -- for almost nine years without a trial. Indeed, if this Court were to adopt the government's position, it would permit life-long imprisonment without a trial, because the government does not assert that there is <u>any</u> time limitation on the confinement of an excludable alien. The issue here is whether life-long imprisonment can reasonably be considered to be non-punitive regulatory detention. In a series of decisions, the Supreme Court has articulated a test to determine when government detention amounts to impermissible punishment. As described in more detail below, whether confinement is punitive depends upon whether there is a rational alternative purpose for the incarceration, whether the confinement is excessive in relation to that alternative purpose, as well as a host of other factors.

A. Excludable aliens may not be punished without a criminal trial.

As an initial matter, the district court was surely

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[6](...continued)
well").

correct in holding that the government cannot punish excludable aliens who are not serving a criminal sentence. See Memorandum at 16; ER at 253. While excludable aliens are not protected by the Due Process Clause in certain matters pertaining directly to their admission, they are not wholly defenseless under our laws. Excludable aliens in INS custody cannot be forced to serve what amounts to a criminal sentence without the same process afforded to criminal defendants. That has been the rule in this country since at least the end of the nineteenth century, when the Supreme Court decided Wong Wing v. United States, 163 U.S. 228 (1896). One of the Chinese exclusion laws had directed that any person of Chinese descent, who was determined by immigration authorities not to be entitled to remain in the United States, should "be imprisoned at hard labor for a period of not exceeding one year" and then deported.[7] Striking down that provision, the Court held that immigration officials could impose "detention or temporary confinement, as part of the means necessary to give effect to . . . the exclusion or expulsion of aliens." Id. at 235. But imprisonment at hard labor was considered an infamous punishment, and it could not be imposed without a criminal trial. Id. at 237. Thus, the Court held, even excludable aliens could not be imprisoned at hard labor

[7] Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25.

without an indictment and a criminal trial. Id. at 238 (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

Following Wong Wing, the Ninth Circuit has also acknowledged that excludable aliens may not be punished without criminal process. Recently, in Alvarez-Mendez v. Stock, 941 F.2d 956 (9th Cir. 1991), cert. denied, 113 S.Ct. 127 (1992), this Court noted that the INS may not punish Mariel Cubans without a trial. Id. at 962. And when they are charged as criminal defendants, excludable aliens are entitled to the same trial procedures as citizens and resident aliens. See, e.g., United States v. Henry, 604 F.2d 908, 912-14 (5th Cir. 1979) (excludable aliens may assert Miranda violations in the same fashion as all other criminal defendants); United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree that the dictates of the Due Process Clause protect the defendant").

Thus, the punishment doctrine properly limits the conduct of our government officials; it bars the imposition of arbitrary or excessive sanctions. The INS may impose detention or temporary confinement in order to effect deportation. But unless the government prosecutes an

excludable alien for a criminal offense, there are a range of sanctions that are simply beyond the power of the government to impose.

B. Kennedy v. Mendoza-Martinez determines which sanctions can only be imposed following a criminal trial.

The government has argued that Mr. Barrera's extended incarceration cannot be deemed punishment. See Government's Brief at 24-25. The government compares Mr. Barrera's imprisonment with the detention of Mr. Ignatz Mezei, which was upheld in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). See Government's Brief at 20. However, Mr. Mezei was not held for almost nine years in maximum security federal penitentiaries, like Mr. Barrera. Mr. Mezei was held for only 21 months in an INS detention facility, Ellis Island. Mezei, 345 U.S. at 209. Most importantly, at the time the Supreme Court decided Mezei, the Court had not yet articulated the full test to determine what sanctions (short of hard labor) are punitive and what sanctions are regulatory.[8] In 1963, ten

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[8] Ignatz Mezei was not held at hard labor, like Wong Wing. Hard labor had long been regarded as an "infamous punishment." See, e.g., *Ex parte* Wilson, 114 U.S. 417, 428 (1885) ("For more than a century, imprisonment at hard labor . . . has been considered an infamous punishment in England and America"). The Wong Wing and Mezei Courts would have had no trouble finding that Wong Wing's (continued...)

years after Mezei, the Court decided Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1962). Mendoza-Martinez and its progeny, and not Mezei, provide the constitutional yardstick to measure Mr. Barrera's confinement.

In Mendoza-Martinez, the Court struck down a law that permitted immigration officials to divest an American of citizenship for leaving the country to avoid the draft. The Court deemed loss of citizenship to be a punitive and not a regulatory sanction. The sanction could only be imposed following "the safeguards which must attend a criminal prosecution." Id. at 184 (footnote omitted). Mendoza-Martinez sets out the test to determine whether a civil sanction should be considered as criminal, and therefore not imposed without the rights afforded criminal defendants. Austin v. United States, 113 S.Ct. 2801, 2806 n.6 (1993). Under that test, a court should first look for direct evidence of an intent to punish. Mendoza-Martinez, 372 U.S. at 169. Absent such an intent, a court must then consider a multitude of factors, including:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of

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[8](...continued)
imprisonment was surely punishment. But at the time Mezei was decided, the Court had not yet formulated a complete test to discern whether sanctions short of hard labor might amount to punishment.

> punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to [that] alternative purpose."

Id. at 168-69 (citations omitted).[9] More recent decisions have isolated the most critical elements of the Mendoza-Martinez test. If there is no direct punitive intent, the punitive/regulatory distinction depends in large part upon whether there is a rational alternative purpose for the sanction, and whether the sanction is excessive in relation to that alternative purpose. See United States v. Salerno, 481 U.S. 739, 747 (1987); Schall v. Martin, 467 U.S. 253, 269 (1984); Bell v. Wolfish, 441 U.S. 520, 538-39 (1979).

In Alvarez-Mendez v. Stock, 941 F.2d at 962, this Court found explicit statutory authority to detain excludable aliens who have been convicted of aggravated felonies. There is no express statutory authority to detain excludable aliens, like Mr. Barrera, who have not been convicted of aggravated felonies. Absent an express legislative command to punish or an expressed governmental intent to punish,[10] the

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[9] These factors provide guidance, though they are neither exhaustive nor dispositive. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 & n.7 (1984); United States v. Ward, 448 U.S. 242, 249 (1980).

[10] Even if a statute appears non-punitive, an intent to punish may be found in the actions of government officials who administer a statute. See Bell v. Wolfish, 441 U.S. 520, 538 (1979)

(continued...)

punitive/regulatory distinction turns on the application of the factors set out in Mendoza-Martinez. In section II of this brief, below, amici discuss the application of those factors. Subsections IIA and B focus upon the two primary elements of the test; subsection IIC addresses the remaining Mendoza-Martinez factors.

II. UNDER KENNEDY V. MENDOZA-MARTINEZ AND ITS PROGENY, INDEFINITE INCARCERATION IN A MAXIMUM SECURITY FEDERAL PENITENTIARY AMOUNTS TO PUNISHMENT, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

A. There is no legitimate non-punitive purpose for incarcerating an excludable alien who cannot be returned to his country of origin.

The INS asserts that Mr. Barrera is being incarcerated as a means of effecting his deportation to Cuba. See Government's Brief at 25. However, the INS has been unable to deport Mr. Barrera during the almost nine years he has been held in maximum security prisons, and there is no indication

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[10](...continued)
("Absent a showing of an expressed intent to punish on the part of detention facility officials," a court will apply the Mendoza-Martinez test); White v. Roper, 901 F.2d 1501, 1505 (9th Cir. 1990) (examining a prison official's individual, subjective intent). Mr. Barrera has argued that an express intent to punish may be found in the parole documents and briefs of the government. Because this is a fact-based argument, it is more appropriately made by counsel for Mr. Barrera. Amici instead will seek to aid the Court by providing a supplemental discussion of the Mendoza-Martinez factors.

that it will be able to do so in the foreseeable future. In fact, the district court invited the government to give evidence of the likelihood of deporting Mr. Barrera in the foreseeable future, Memorandum at 24; ER at 261, but the government could not do so. His continued incarceration simply cannot be justified by a purpose that cannot be accomplished.

The INS further asserts that it is rational to incarcerate Mr. Barrera to protect society. See Government's Brief at 25. But the INS does not have the general power or duty to protect society from those it considers, for some reason, to be dangerous. The INS is not a general police authority. It has no general powers of preventive detention. As this Court recognized in Alvarez-Mendez v. Stock, the INS' ability to protect society stems from its duty to exclude aliens on criminal and related grounds. 941 F.2d at 962 (citing 8 U.S.C. § 1182(a)(2)). In its own Brief, the INS concedes that its only powers relate to the enforcement of immigration laws. See Government's Brief at 1 (citing to 8 U.S.C §§ 1103, 1182, 1225, 1226, 1227). These powers include the authority to enforce exclusion through deportation; the INS is only able to hold excludable aliens in custody because of its duty to deport them. If this duty cannot be performed, the INS must lose its power to detain.

Mr. Barrera's confinement is analogous in many ways to the detention of insanity acquittees. The predicate for confinement of insanity acquittees is to treat their mental illness and to protect them and society from their possibly dangerous propensities. Jones v. United States, 463 U.S. 354, 369 (1983). The alleged predicate for detaining Mr. Barrera is to effect his deportation and to protect society from him. In the insanity acquittee context, when the main predicate for the commitment is no longer present (i.e. the person is no longer mentally ill), it is a violation of due process for that detention to continue. In Foucha v. Louisiana, 112 S.Ct. 1780, 1788-89 (1992), the Court struck down a Louisiana statute that allowed the continued confinement of insanity acquittees who were no longer mentally ill, but who remained dangerous. The Court stated that the nature of a person's commitment must have a reasonable relation, a reasonable nexus, to the purpose of the confinement. Id. at 1785 (citations omitted). When an insanity acquittee is no longer mentally ill, that nexus no longer exists, and the person must be released, even if he or she is still dangerous. Id. at 1784-85.

Similarly, for Mr. Barrera, the primary expressed purpose for his confinement, facilitating his deportation to Cuba, cannot be accomplished. That purpose therefore no longer

exists. It can be given no effect. Foucha requires that regulatory confinement must be related to the purpose of confinement. But deportation to Cuba is not possible, and continued incarceration to effectuate deportation is plainly unreasonable.

Nor, under Foucha, is a claim of dangerousness a sufficient or independent non-punitive reason to incarcerate. If an excludable alien cannot be deported, but remains dangerous, then it is the duty of the traditional law enforcement agencies to prosecute him or her for any criminal actions, and in that way protect society. Here, the government claims that Mr. Barrera has committed assaults and other acts while in prison. See Government's Brief at 4, 6 n.6. In Foucha, the State made the same allegations. Foucha, 112 S.Ct. at 1786. The Court held, however, that there was no reason why the State's interests "would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." Id. Thus, the Attorney General loses any additional powers over excludable aliens when deportation cannot be effected, and the goal of protecting society is not an independent legitimate purpose for confinement. Instead, detention merely accomplishes the sub rosa purpose of

punishing Mr. Barrera for a criminal act for which his guilt cannot be established.

B. When an alien cannot be returned to his country of origin, indefinite incarceration in a maximum security federal prison is excessive in relation to any legitimate non-punitive purpose.

Generally, "regulatory" confinement is an extremely narrow exception to the constitutional prohibition against deprivations of liberty without due process. In several limited contexts, the Supreme Court has upheld such regulatory confinement. But in each of these areas, the Court has set some sort of limit to the duration of this confinement. Usually, it is limited to the reasonable period of time necessary to accomplish the purpose of the confinement. Certainly, the Court has allowed for variation in what this "reasonable period" can be, depending on the facts of each individual's situation. But in each circumstance, once the time of the confinement extends beyond this "reasonable period," continued confinement violates due process.

In this section, amici have focused on two regulatory confinements that are analogous to Mr. Barrera's: pre-trial detention and the commitment of persons found incompetent to stand trial. Both of these situations are similar to Mr. Barrera's in one key respect: the confined persons are not

being punished for any crime for which they have been convicted. In all three situations, the government holds the person in order to achieve a certain non-punitive purpose. For pre-trial detainees, it is to hold them for trial. For mental incompetents, it is to treat them so that they may become competent to stand trial. For excludable aliens like Mr. Barrera, it is to effect their deportation. But in each situation, once the period of that confinement becomes unreasonably long and excessive in relation to the stated purpose, courts will find that continued confinement violates the detainee's due process rights. At that point, the detainee is entitled to some form of procedural due process, namely a civil commitment hearing or a criminal trial. Absent that process, the detainee must be released.

1. Under Salerno and its progeny, pre-trial detainees may only be held for a reasonable period of time, one to three years, at most.

In 1984, Congress passed the Bail Reform Act, 18 U.S.C. §§ 3141, et seq., which provided for pre-trial detention without bail. In United States v. Salerno, 481 U.S. 739, 752 (1987), the Supreme Court upheld these provisions against a facial challenge. Applying the factors of Mendoza-Martinez to pre-trial detainees, the Court expressly left open the

possibility that, at some point, pre-trial detention might become excessively prolonged, and thus constitute arbitrary punishment without due process of law. Id. at 747 n. 4.

To determine when detention has become excessively prolonged, federal courts have engaged in a factually-based, case-by-case inquiry. See, e.g., United States v. Hare, 873 F.2d 796, 801 (5th Cir. 1989); United States v. Gelfuso, 838 F.2d 358, 359 (9th Cir. 1988); United States v. Gonzales Claudio, 806 F.2d 334, 340 (2d Cir.), cert. dismissed, 479 U.S. 978 (1986). The courts have looked to such factors as duration of confinement, the extent to which the prosecution or the defense bears responsibility for the delay, and the strength of the evidence that the detainee poses a risk of flight. Gonzales Claudio, 806 F.2d at 340.[11]

Using this analysis, a pattern has developed. The less serious the charge, the weaker the government's case, the more government responsibility for the delay, and the more speculative or lengthy the confinement will be, the more likely a court will find a due process violation. At that point, the federal court will order the government to release the defendant, usually subject to certain release conditions. See, e.g., Hare, 873 F.2d at 801 (ten month pre-trial

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[11] Additionally, the Fifth Circuit has looked to the potential pre-trial confinement that may occur in the future, the nonspeculative nature of future detention, and the complexity of the case. Hare, 873 F.2d at 801.

confinement raised due process concerns and required a remand for a hearing); United States v. Ojeda Rios, 846 F.2d 167, 169 (2d Cir. 1988) (continued detention after 32 months violated due process when defendant agreed to all release conditions, including the use of an ankle bracelet); Gelfuso, 838 F.2d at 359 (ten month confinement pending a racketeering trial did not violate due process when the government was not responsible for the delay); United States v. Jackson, 823 F.2d 4, 7-8 (2d Cir. 1987) (potential of over a year of pre-trial detention not a due process violation when there was a great flight risk and the defendant was partially responsible for the delay of the trial); United States v. Melendez-Carrion, 820 F.2d 56, 59-61 (2d Cir. 1987) (confinement for 19 months not a denial of due process when there was no prosecutorial delay, and the defendants were members of a paramilitary terrorist group that claimed responsibility for various extremely violent acts); Gonzales Claudio, 806 F.2d at 341 ("[d]etention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process").[12]

Thus, the cases applying the Salerno test show that periods of indefinite regulatory confinement of one to three

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[12] See also United States v. Zannino, 798 F.2d 544 (1st Cir. 1986). In this pre-Salerno case, the First Circuit notes that "in many, perhaps most, cases, sixteen months would be found to exceed the due process limitation on pretrial confinement." Id. at 548.

years -- well under nine years -- can become excessive, and thus punitive in violation of the Due Process Clause. And this is true despite all the procedural protections given to arrested persons under the Bail Reform Act. Indeed, in Salerno, the Supreme Court explicitly emphasized these protections in approving the regulatory detention scheme contained in the Act. Salerno, 481 U.S. at 742, 747-48. First, before an arrested person can be confined pre-trial, the government must show by clear and convincing evidence that no release conditions "will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(e). This must be proved at an adversary hearing where the potential detainee has the right to counsel, the right to testify, the right to present and cross-examine witnesses, and the right to proffer evidence, among other protections. Salerno, 481 U.S. at 742. Second, pre-trial detainees must "be housed in a 'facility separate, to the extent practicable, from persons awaiting or serving sentences . . .'" Salerno, 481 U.S. at 748 (quoting 18 U.S.C. § 3142(i)(2)). In fact, most pre-trial detainees are held in detention centers or county jails, apart from convicted criminals.[13] Third, the "maximum length of pretrial detention is limited by the

[13] The Fifth Circuit has noted that, in certain circumstances, the failure to separate pre-trial detainees from convicted felons violates the constitution. See Pembroke v. Wood County, Texas, 981 F.2d 225, 229 (5th Cir.), cert. denied, 113 S.Ct. 2965 (1993).

stringent time limitations of the Speedy Trial Act." Id. at 747.[14]

Unlike the pre-trial detainees in the Salerno cases, or the juveniles in Schall, Mr. Barrera has been accorded no procedural protections whatsoever. Moreover, although he has not been charged with a crime, Mr. Barrera has been housed for almost nine years in maximum security prisons, apparently alongside hundreds of convicted violent felons. Mr. Barrera's incarceration is far longer, and different in kind, than any sort of pre-trial regulatory detention approved in Salerno.

2. Under Jackson v. Indiana and its progeny, defendants may be held as unfit to stand trial for only a short, reasonable period of time, far less than nine years.

A second major area of regulatory confinement analogous to Mr. Barrera's situation is the treatment of criminal defendants found mentally incompetent to stand trial. In Jackson v. Indiana, 406 U.S. 715 (1972), the Supreme Court

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[14] Another example of "regulatory" confinement upheld by the Court was in Schall v. Martin, 467 U.S. 253 (1984). In Schall, the Court upheld the provisions of the New York Family Court Act, which permitted the pre-trial detention of juvenile delinquents. Finding that the provisions did not violate due process, the Court emphasized similar protections: full notice of charges, an adversary hearing, right to counsel, among others. Id. at 274-81. Further, as with pre-trial detainees under Salerno, the juveniles were housed separately. Id. at 270-71. Most importantly, the New York statute limited the pre-trial detention of juveniles to just 17 days. Id. at 270.

held that a criminal defendant may not be committed to custody as incompetent to stand trial for more than the reasonable period necessary to determine if the defendant will at some point become competent. If examiners find that the defendant will never become competent, or will not become competent within the foreseeable future, the government cannot continue to hold the defendant without a civil commitment hearing. At a commitment hearing, the government must show, by clear and convincing evidence, that the person is mentally ill and will pose a danger to him or herself or others. See Addington v. Texas, 441 U.S. 418, 431-33 (1979) (standard is clear and convincing evidence); O'Connor v. Donaldson, 422 U.S. 563, 574-75 (1975) (state may not confine a person who is mentally ill but harmless).

The Jackson rule is best illustrated by the facts of Jackson itself. Theon Jackson was a mentally-defective deaf mute, accused of robbing two women. Jackson, 406 U.S. at 717. He was declared unfit to stand trial and held for three and a half years. Id. at 719, 738. However, there was no evidence that he would ever become mentally fit. Id. at 718-19. Thus, he was ordered released unless the state could prove that he met the same criteria for civil commitment applicable to all other people. Id. at 738. Jackson requires that "the nature and duration" of confinement "bear some reasonable relation to

the purpose for which the individual is committed." Id.; see also Foucha, 112 S.Ct. at 1785. Because there was no evidence that Theon Jackson could become fit, the criminal charges could no longer provide a reasonable basis for his confinement.

For federal defendants, the Jackson rule has been written into a statute, 18 U.S.C. §§ 4241(d)(1) and (2). Under that statute, once a criminal defendant is deemed incompetent, the government must hospitalize him or her "for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will [become competent]." § 4241(d)(1) (emphasis added). If at the end of the four month period the defendant is still incompetent, the government may hospitalize the defendant "for an additional reasonable period of time . . . ." § 4241(d)(2). If at the end of this "additional reasonable period" the defendant's condition has not improved, the government must institute proceedings just like civil commitment hearings. 18 U.S.C. § 4246 (defendant cannot be detained unless government can show, by clear and convincing evidence, that defendant is mentally ill and dangerous).

As with the cases applying Salerno, the federal courts have applied a fact-based, case-by-case inquiry to determine

what is a "reasonable period" of commitment, and at what point that confinement ceases to have any rational relationship to its original purpose. Again, as with the Salerno cases, if the period of confinement reaches two to three years, with no sign that the defendant will become competent in the foreseeable future, federal courts will find a due process violation. Additionally, if the period of confinement reaches the duration of the maximum penalty for the crime charged, a federal court will generally forbid further confinement. See, e.g., United States v. Charters, 829 F.2d 479, 485-87 (4th Cir. 1987) (three year confinement of defendant who has no chance of becoming competent is unreasonable) reh'g on other grounds, 863 F.2d 302 (1988) (en banc), cert. denied, 494 U.S. 1016 (1990); United States v. DeBellis, 649 F.2d 1, 3 (1st Cir. 1981) (holding an incompetent defendant beyond the duration of his maximum possible sentence if convicted (30 days) is unreasonable and a denial of due process); United States v. Juarez, 540 F.Supp. 1288, 1293 (W.D. Tex. 1982) (once it is determined that the confined defendant has little chance of becoming competent, the committing court must order a civil commitment hearing or release the defendant); United States v. Pardue, 354 F.Supp. 1377, 1382 (D.Conn. 1973) (three year detention of defendant not likely to become competent violates due process and "surpasse[s] any reasonable period of

time permitted. . . .").

About half of the states have implemented the Jackson command by drafting statutes or rules setting the absolute maximum period that the government can hold an incompetent defendant.[15] The periods allowed by these state statutes have ranged from as low as six months (Washington) to as high as three years (Oregon). See Wash. Rev. Code Ann. § 10.77.090 (West 1993); Or. Rev. Stat. § 161.370(6)(a) (West 1993); see also Cal. Penal Code § 1370.1.(c)(1)(A) (West 1994) (maximum of 6 months); Wis. Stat. Ann. § 971.14(5)(a) (West 1993) (maximum of 12 months); Conn. Gen. Stat. Ann. § 54-56d(i) (West 1993) (maximum of 18 months).

The other states have drafted much vaguer statutes, and have left it to the courts to implement the Jackson command of reasonableness. Initially, during the period just after Jackson, the state courts struck down some very long commitments held over from the pre-Jackson era. See, e.g., People v. Arendes, 400 N.Y.S.2d 273, 278 (N.Y. Sup. Ct. 1977) (commitment of 13 years violated due process); Commonwealth v. McBurse, 348 A.2d 423, 425 (Pa. 1975) (eight years unreasonable); Commonwealth v. McQuaid, 347 A.2d 465, 475 (Pa. 1975) (15 years unreasonable); People v. Anonymous, 351

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[15] For a general discussion of how the states have treated the Jackson command, see Michael L. Perlin, Mental Disability Law §§ 14.14-14.16 (1989 & Supp. 1992).

N.Y.S.2d 869, 872 (N.Y. Sup. Ct. 1974) (five years unreasonable); Kesselbrenner v. Anonymous, 347 N.Y.S.2d 369, 371 (N.Y. Sup. Ct. 1973) (25 years unreasonable).

More recently, as the states have more fully incorporated the Jackson command into their statutory and decisional law, the courts have generally found periods exceeding three years as unreasonable. For example, the Louisiana Supreme Court found that a two year confinement was unreasonable under Jackson, even though a statute allowed confinement up to the maximum possible sentence of nine years. State *ex rel.* Lockhart v. Armistead, 351 So.2d 496, 498 (La. 1977);[16] see also People v. Miller, 489 N.W.2d 60 (Mich. 1992) (following statute and limiting confinement to 15 months); State v. Bias, 352 S.E.2d 52, 57 (W.Va. 1986) (one year confinement "prima facie unreasonably long" under prior decision and statute applying Jackson).[17]

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[16] Jackson, of course, sets forth a constitutional rule. The Louisiana Supreme Court therefore properly assessed the Jackson requirement independently of the outer limit set by the state statute.

[17] Amici have found decisions from only one jurisdiction that seemingly permit commitments of incompetent defendants for periods longer than three years. However, that state, Illinois, has a unique statutory scheme. After a year, an incompetent defendant is entitled to a discharge hearing. See Ill. Stat. ch. 725, § 5/104-23 (West 1993). The defendant can only be held longer than one year as unfit to stand trial if, at the discharge hearing, the state can prove beyond a reasonable doubt that the defendant committed the offense. Id., § 5/104-25(d). If the state meets this burden, the defendant

(continued...)

The lesson of these cases is that, if there has been no criminal conviction, the government can only confine a person for a reasonable period of time, and only for so long as the confinement bears a reasonable relation to its original purpose. If the period of confinement goes beyond the reasonable period of time, or if it loses its connection to a legitimate purpose, then continued confinement is excessive and violates due process. The cases applying Jackson indicate that periods of one, two or three years may be upheld as reasonable regulatory confinement, depending on the circumstances.

In their search through federal and state cases, amici curiae have located only one decision upholding a regulatory confinement for a period close to nine years. In Doherty v. Thornburgh, 943 F.2d 204 (2d Cir. 1991), cert. dismissed, 112 S.Ct. 1254 (1992), the Second Circuit approved the INS' detention of James Doherty, who was held for eight years pending deportation and extradition to the United Kingdom. Doherty, a member of the Provisional wing of the Irish Republican Army, had escaped from the U.K. following his

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[17](...continued)
may be committed for a more extended period. For the most serious offense, murder, this extended period is limited to five years. Id. If the defendant remains unfit at the end of that period, he or she must be tried, civilly committed or released. Id., § 5/104-25(g). The Illinois courts have held that this unique procedure comports with Jackson. See, e.g., People v. Bocik, 570 N.E.2d 671, 676 (Ill. App. Ct.), appeal denied, 580 N.E.2d 120 (Ill. 1991).

conviction for murdering a British Army captain. The Court upheld Doherty's detention in a federal jail, noting that his own legal maneuverings caused a substantial portion of the delay. Id. at 211-12. Further, Doherty could be released from custody whenever he agreed to his return to the United Kingdom. Thus, Doherty himself possessed "the key that unlock[ed] his prison cell." Id. at 212.

Doherty presents a much different case from that of an alien who cannot be returned to his or her country of origin for reasons beyond the alien's control. Even if he were to agree to his own deportation, Mr. Barrera cannot be returned to Cuba. Unlike Mr. Doherty, Mr. Barrera does not possess "the key that unlocks his prison cell." His confinement is much more akin to that of a defendant held as unfit to stand trial, but who will never be made competent. And no case applying Jackson has upheld that sort of confinement for a period as long as nine years, and especially not such a lengthy confinement in a maximum security prison. Continued confinement under these circumstances is excessive. It becomes an arbitrary punishment, rather than a narrowly tailored "regulatory confinement."

C. The remaining Mendoza-Martinez factors also show that indefinite imprisonment is punishment.

1. Imprisonment has historically been regarded as punishment.

For 200 years, imprisonment has been considered a form of punishment in the United States. See Leonard Orland, Prisons: Houses of Darkness 22 (1975). As punishment, imprisonment is a uniquely American invention. See Norval Morris, The Future of Imprisonment 4 (1974). Prior to the American Revolution, incarceration was only employed to detain persons awaiting trial or sentencing. See Michael Sherman and Gordon Hawkins, Imprisonment in America 79 (1981). Influenced by Quaker ideals, Pennsylvania replaced banishment, corporal and capital punishment with imprisonment as the standard form of punishment. See Orland, supra, at 19-22. In 1790, the Walnut Street Jail in Philadelphia became the first prison in the world for punishing convicted felons. Id. at 22; Morris, supra, at 5. During the 1820s, the popularity of imprisonment grew, and other states soon began building prisons. See Orland, supra, at 23-24. Many foreign countries also began using imprisonment as a form of punishment. See Morris, supra, at 5.

There is no doubt that the historical purpose of imprisonment is to punish by depriving inmates of their liberty. They may not leave, they may not do those things that they wish to do, they may not see whom they wish, and

inmates are forced to cohabit with "uncongenial strangers." See Andrew von Hirsch, Doing Justice: The Choice of Punishments 109-110 (1976).

In addition, imprisonment punishes by isolating an inmate and constantly reminding him of his condition. See Orland, supra, at 25-26. The term "penitentiary" comes from the Latin "to repent." Id. at 22. An early Pennsylvania writing noted that each inmate, "will necessarily be made the instrument of his own punishment; his conscience will be the avenger of society . . . . The convict will be compelled to reflect on the error of his ways." See David J. Rothman, The Discovery of the Asylum 85 (1971) (quoting George W. Smith, A Defense of the System of Solitary Confinement of Prisons 71, 75 (1833)).

2. Imprisonment promotes the traditional aims of punishment -- retribution and deterrence.

By placing people in prison, the government promotes the traditional aims of punishment. One traditional aim of punishment is retribution -- the idea that it is right for the wicked to be punished because they should receive their "just deserts." See Herbert L. Packer, The Limits of the Criminal Sanction 37-38 (1968). Inmates are forced to "pay" for their crimes by serving their time. "The heart of the retribution rationale is that a criminal sentence must be directly related

to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137, 149 (1987). Another traditional aim of punishment is deterrence, which includes both individual deterrence (aimed at the offender) and general deterrence (aimed at others). See Gordon Hawkins, The Prison: Policy and Practice 37-38 (1976). Both traditional aims of punishment are served by incarcerating excludable aliens, especially when they are imprisoned due to alleged misbehavior in a halfway house.

Whether or not a court finds an express or direct intent to punish Mr. Barrera (see footnote 10 of this Brief, supra), the INS has directly linked Mr. Barrera's alleged assault in the halfway house to his incarceration. Mr. Barrera's parole was revoked due to this claimed misconduct, and he has been denied reparole for the same reason. Hence, Mr. Barrera's incarceration is directly related to his alleged criminal act, which promotes retribution.

Imprisoning Mr. Barrera also promotes specific and general deterrence. It teaches Mr. Barrera, specifically, and all Mariel Cubans and other excludable aliens, generally, that they may be imprisoned without a criminal trial if there is even a whisper that they have misbehaved in a halfway house. It will deter them from doing anything that may bring attention to them, from doing any activity that may lead to

charges being brought against them, whether or not those charges may be proved in a court of law.

3. Imprisonment is an affirmative restraint.

During the period that convicted felons are imprisoned, they are not only incapacitated from committing additional crimes, but are affirmatively prevented from having any meaningful contact with society. Indeed, "isolation of the dangerous has always been considered an important function of the criminal law." Powell v. Texas, 392 U.S. 514, 539 (1968) (Black, J., concurring). Mr. Barrera, who has not been found guilty of any new crime, is similarly punished. He is subjected to incapacitation and is affirmatively isolated from society.

4. Imprisonment has been imposed for alleged behavior that is already a crime.

As already noted, imprisonment is generally imposed as punishment for criminal conduct. And Mr. Barrera, too, is imprisoned for behavior that is punishable under our criminal laws. He is in custody because he allegedly committed sodomy, assault and burglary in the halfway house. See Final Notice of Parole Denial, dated Feb. 3, 1993; ER at 209. These acts

have been outlawed by the California legislature. See Cal. Penal Code §§ 245, 286, 459; see also Felony Complaint; ER at 173-78. Hence, Mr. Barrera remains in prison because the government has accused him of criminal acts. If Mr. Barrera was not believed to have committed criminal acts, he would today be free on immigration parole.

5. Imprisonment is generally imposed only upon a finding of scienter.

Scienter is the mental state required as part of a crime or tort; the requirement of scienter usually means that the act was done with guilty intent or knowledge. See People v. Gould, 211 N.W. 346, 348 (Mich. 1926). Under the common law scienter was a required element of every crime. Most criminal statutes have retained this requirement, though a legislature may enact a statute that criminalizes conduct without a finding of scienter. See United States v. Balint, 258 U.S. 250, 251-252 (1922). Because most criminal statutes retain this element, the sanction of imprisonment is generally employed only after a finding of scienter.

As already indicated, Mr. Barrera is in Leavenworth because the government believes that he committed criminal acts. These acts contain, as an element, specific intent or scienter. See Cal. Penal Code § 20 ("In every crime . . .

there must exist a union, or joint operation of act and intent, or criminal negligence").

In sum, then, extended penitentiary confinement of an excludable alien, who cannot be returned to his country of origin, is punishment under the Kennedy v. Mendoza-Martinez test. First, there are no rational, non-punitive reasons for such an incarceration, because the INS's power to protect society is not independent of its power to exclude. Second, incarceration is excessive to accomplish any rational non-punitive purpose; cases upholding regulatory confinements after Salerno and Jackson generally draw the constitutional line at periods of one to three years. Third, the remaining Mendoza-Martinez factors also indicate that incarceration is punishment. Mr. Barrera has been held for nearly nine years. If this Court adopts the government's position, Mr. Barrera may be imprisoned without a trial for the rest of his natural life. His incarceration is punishment without a criminal trial, in violation of the Fifth and Sixth Amendments.

CONCLUSION

Amici curiae respectfully suggest that the district court's ruling be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXIS BARRERA-ECHAVARRIA,	)	C.A. No. 93-56682
Petitioner-Appellee,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
RICHARD H. RISON, Warden,	)	
	)	
Respondent-Appellant.	)	
	)	

I, Valerie Adair, say:

1. That I am over eighteen (18) years of age, a resident of the County of Los Angeles, State of California, not a party in this action, and that my business address is USC Law Center, University Park, Los Angeles, California 90089-0071;

2. That I caused to be delivered an original and 16 copies of the Brief of Amici Curiae to the U.S. Court of Appeals for the Ninth Circuit; and

3. That I served the Brief of Amici Curiae by sending two copies each to:

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and that the Brief of Amici was filed and served by delivering the Brief to Airborne Express for overnight delivery to the Court and to Counsel, shipping charges fully prepaid, at Los Angeles, California, on January 18, 1994.

I declare that the foregoing is true and correct. Executed this 18th day of January, 1994, at Los Angeles, California.

_____
Valerie Adair