NOTES

LIFE WITHOUT PAROLE: AN IMMIGRATION FRAMEWORK APPLIED TO POTENTIALLY INDEFINITE DETENTION AT GUANTÁNAMO BAY

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The Supreme Court ruled in Boumediene v. Bush *that detainees at Guantánamo Bay have the right to challenge their detention in habeas corpus proceedings and that the courts hearing these claims must have some ability to provide "conditional release." However, in* Kiyemba v. Obama*, the United States Court of Appeals for the District of Columbia ruled that if a detainee cannot be released to his country of origin or another country abroad, a court sitting in habeas cannot grant the detainee release into the United States. The court based its determination on the assumption that the plaintiffs' request for release implicated "admission," generally considered within the purview of the political branches and inappropriate for judicial review. This Note argues that "parole," a more flexible mechanism for release into the United States, is not limited by the admission precedents requiring extreme deference. This Note then surveys cases in which the judiciary has granted parole as a remedy, and argues that courts have done so primarily in cases of executive misconduct. Thus, courts confronting requests for domestic release from executive detention without a legal basis should consider parole as a remedy distinct from admission—one that serves a valuable purpose in maintaining a meaningful check on the Executive.*

INTRODUCTION

In 2001, a fruit peddler,[1] a hat maker, a shoe repairman, and a typist[2] fled their homes in Xinjiang in western China.[3] Xinjiang is the

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[1] William Glaberson, *U.S. Court, in a First, Voids Finding by Tribunal*, N.Y. TIMES, June 24, 2008, at A15.

[2] William Glaberson & Margot Williams, *Exile Detainees at Guantánamo Pose a Dilemma*, N.Y. TIMES, Apr. 1, 2009, at A1.

traditional home of the Uighurs,[4] a Turkic Muslim group that has engaged in violent clashes with the Chinese government over their "separatist aspirations."[5] The fleeing Uighurs eventually arrived at a camp near Jalalabad, Afghanistan, where they heard they could get free food and shelter.[6] After the Uighur camp was destroyed by U.S. military forces in late 2001, the Uighurs made their way to Pakistan, where they were turned over to the U.S. military in exchange for a large bounty.[7]

Twenty-two of these Uighurs were eventually transferred to the U.S. Naval Base in Guantánamo Bay, Cuba.[8] The United States claimed the right to detain the Uighurs as "enemy combatants,"[9] but the United States Court of Appeals for the District of Columbia definitively rejected that assertion in 2008.[10] However, the Uighurs remained imprisoned at Guantánamo Bay because they feared "arrest, torture or execution" if returned to China, and international obligations forbid the United States from returning individuals to countries where they would be "subject to mistreatment."[11] Although

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[3] *See* Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. TIMES, June 10, 2007, at A1 ("Most of the five Uighurs in Tirana said they had left their homes in China's far-western Xinjiang Province, an area the Uighurs call East Turkestan, to earn more money for their families and escape government harassment.").

[4] Adam Wolfe, *China's Uighurs Trapped at Guantánamo*, ASIA TIMES ONLINE, Nov. 4, 2004, http://www.atimes.com/atimes/China/FK04Ad02.html. The term "Uighur" is pronounced "wee-ger."

[5] *See* Neil Arun, *Guantánamo Uighurs' Strange Odyssey*, BBC NEWS, Jan. 11, 2007, http://news.bbc.co.uk/2/hi/europe/6242891.stm ("Rights groups say thousands have been killed or imprisoned in China's crackdown on the Uighurs' separatist aspirations.").

[6] *See id.* (describing Uighurs' journey to Afghanistan); *see also* Golden, *supra* note 3 (same).

[7] *See* Parhat v. Gates, 532 F.3d 834, 837 (D.C. Cir. 2008) (recounting undisputed testimony that Parhat and other unarmed Uighurs were handed over to Pakistani government officials who turned them over to the U.S. military); *In re* Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33, 35 (D.D.C. 2008) (same).

[8] *See* Golden, *supra* note 3 (observing that twenty-two Uighurs "ended up at Guantánamo").

[9] "An 'enemy combatant' is 'an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.'" Kiyemba v. Obama, 555 F.3d 1022, 1024 n.1 (D.C. Cir. 2009) (quoting *Parhat*, 532 F.3d at 838).

[10] *Parhat*, 532 F.3d at 854 (concluding that the court could not find the "government's designation of Parhat as an enemy combatant . . . consistent with the specified standards and procedures"). The court noted that there was some evidence to suggest the unattributed claims might have come from the Chinese government. *Id.* at 848.

[11] *Kiyemba*, 555 F.3d at 1024. The United States is party to an international treaty which prohibits member states from transferring individuals to states where they would face persecution. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3.1, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85. The United States Senate advised and consented to the ratification on

it was now undisputed that the Uighurs were not members of Al Qaeda or the Taliban and had never opposed the United States or its allies, they faced potentially indefinite detention.

The Uighurs challenged their detention under *Boumediene v. Bush*,[12] which established the constitutional right of Guantánamo detainees to bring such challenges through federal habeas corpus proceedings, absent suspension of that right by Congress.[13] *Boumediene* also held that a court sitting in habeas must have the power to order the "conditional release" of an unlawfully detained individual, but the opinion noted that "release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted."[14] The Uighurs' request for "release into the continental United States"[15] forced consideration of what remedy was appropriate for unlawfully detained individuals who could not be released to other countries. This question is posed in its starkest form because, if no remedy can be formulated, individuals risk indefinite detention, despite the lack of any legal basis for continued custody.

The courts that addressed the Uighurs' claims floundered in deciding what legal framework applied to the question, much less what remedy could or *should* be granted. The District Court for the District of Columbia ordered the government to release the Uighurs into the United States, observing that "separation-of-powers concerns do not trump the very principle upon which this nation was founded—the unalienable right to liberty."[16] The Court of Appeals reversed and remanded in *Kiyemba v. Obama*,[17] barring the judiciary from ordering

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October 27, 1990. 136 CONG. REC. 36,192–99 (1990). In 1998, Congress implemented the United States' obligations through passage of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, -822 to -823 (amending the Immigration and Nationality Act § 241(b)(3), codified at 8 U.S.C. § 1231(b)(3) (2006)). *See also* William L. Tucker, *Legal Limbo: Where Should the Guantánamo Uighurs Be Released?*, 16 ILSA J. INT'L & COMP. L. 91, 103–05, 114 (2009) (discussing international law issues raised by the Uighurs' detention).

12 553 U.S. 723 (2008).

13 *Id.* at 771 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantánamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause."). Detained individuals can petition for a writ of habeas corpus, which, if issued, requires the custodian detaining the individual to "justify the restraint as lawful." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1153 (6th ed. 2009).

14 *Boumediene*, 553 U.S. at 779.

15 Huzaifa Parhat's Motion for Judgment on His Habeas Petition Ordering Release into the Continental United States at 1, *In re* Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33 (D.D.C. 2008) (No. 05-1509).

16 *In re Guantánamo Bay*, 581 F. Supp. 2d at 34.

17 555 F.3d 1022 (D.C. Cir. 2009).

such release.[18] Evaluating the Uighurs' request as an immigration law issue, Judge A. Raymond Randolph found that the political branches of the government had exclusive power to decide who could enter the United States and on what terms.[19] The court held that the judiciary could not usurp this power.[20] Judge Judith Rogers concurred in the remand but asserted that the district court would have the power to order the petitioners' release into the United States if their detention was found to be unlawful and indefinite.[21]

These three disparate conclusions—of the district court, Judge Randolph for the court of appeals, and Judge Rogers in her concurrence—are not surprising considering the petitioners' failure to specify exactly what relief they were requesting. The Uighurs requested "release" into the United States.[22] Primarily used in the context of discussions regarding habeas relief and liberation from custody,[23] "release" is meaningless when discussing the presence of noncitizens in the United States under immigration law. Those laws have established that any noncitizen who is physically present on U.S. soil is either "admitted" or "paroled," in accordance with immigration law, or here illegally.[24] Since the court-ordered "release" sought by the Uighurs could not place them into the country illegally, the relief they requested must be construed as either admission or parole, in contrast to what other scholars have claimed.[25]

"Admission" refers to the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[26] "Parole," on the other hand, is government permission to enter the territory of the United States without having been

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[18] *Id.* at 1029 (concluding that the court could not require anything other than a good faith effort by the government to resettle petitioners and remanding on those grounds).

[19] *Id.* at 1025.

[20] *Id.*

[21] Judge Rogers concurred in the remand on the grounds that the District Court had prematurely granted release without evaluating the government's additional claim that it could legally detain the Uighurs pursuant to immigration law. *Id.* at 1038–39 (Rogers, J., concurring).

[22] *See* sources cited *infra* note 100.

[23] *See infra* note 36 and accompanying text (discussing traditional habeas corpus relief).

[24] *See, e.g.*, Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (defining inadmissibility as being "present in the United States without being admitted or paroled, or . . . arriv[ing] in the United States at any time or place other than as designated by the Attorney General").

[25] *See, e.g.*, Caprice L. Roberts, *Rights, Remedies, and Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L.J. 1, 7 (2009) ("Denying jurisdiction and the remedy on the basis of immigration precedent is thus fundamentally flawed.").

[26] Immigration and Nationality Act § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006).

"admitted."[27] Despite being physically present in the United States, paroled individuals *legally* remain at the border as if they had never entered.[28]

The significance of formal admission runs throughout immigration law, both statutory and constitutional.[29] None of the judges in the decisions discussed above identified which type of entrance they believed the Uighurs were requesting or indicated that the type of relief requested would significantly affect the appropriate evaluation of their claims.

This Note argues that litigants and judges should confront the contours of these immigration doctrines in order to appropriately analyze the Uighurs' claims as well as future claims by persons similarly situated. If the Uighurs are seeking "admission," their request triggers a separation-of-powers theory known as the plenary power doctrine, which is highly deferential to the political branches. If their request is for parole, however, it does not necessarily require the judiciary to play such a passive role. Parole decisions are reviewable by courts, and parole has been granted as a remedy by federal courts in various cases, including habeas proceedings. Thus, the proper legal analysis of the Uighurs' request for release into the United States changes depending on how one construes the desired remedy.[30]

This Note proceeds in three parts. In Part I, I discuss the two immigration doctrines that must be confronted when determining the proper relief in these cases. The first is the plenary power doctrine, which asserts that the judiciary should refrain from meaningful review of admission determinations made by the political branches. The second is the "entry fiction" doctrine, under which the United States may treat some noncitizens who are physically inside the country as if they were still outside its borders, such that an individual's presence on United States territory may or may not coincide with his immigration status. In Part II, I analyze the opinions of the three judges who have confronted the Uighurs' claims for release into the United States, and I then illustrate the confusion that surrounds both the

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[27] 8 U.S.C. § 1101(a)(13)(B) ("An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.").

[28] *See infra* notes 43–45 and accompanying text (discussing contours of entry fiction).

[29] *See infra* Part I.A (discussing precedential development of plenary power over admissions decisions).

[30] This Note does not address the issues logically antecedent to the remedial question, including questions regarding the scope of constitutional habeas corpus and other constitutional rights beyond the right to habeas corpus to which the Guantánamo detainees might be entitled. Instead, this Note addresses how courts should determine what habeas remedy to grant the Uighurs, or others similarly situated, should relief be warranted.

nature of the relief requested and which legal framework should apply. In particular, I address the confusion regarding whether admission and parole are both insulated from meaningful judicial review. I present several cases in Part II that demonstrate that the judiciary is capable of granting parole as a remedy and does so in cases involving executive misconduct. In Part III, I discuss the implications of the judiciary granting parole in such cases. These cases demonstrate that the real question turns on competing separation-of-powers narratives. Reframing the issue as one of separation of powers might help analyze the indefinite detention of the Uighurs and their desire for "release."

While the facts undergirding the Uighurs' original petition for release have changed,[31] the *Kiyemba* decision remains good law in the D.C. Circuit.[32] The decision now imposes a profound limitation on the power of the judiciary to order relief from indefinite detention.[33] In addition, as history demonstrates, the government and the courts have not developed a coherent, sensible approach to indefinite detention when the government is unable to deport a "non-desirable" individual

[31] Each detained Uighur has received at least one offer of resettlement. Kiyemba v. Obama, 130 S. Ct. 1235, 1235 (2010) (per curiam) (vacating judgment and remanding for further proceedings in light of changed facts). Five Uighurs remained detained as of April 2011, when the Supreme Court denied certiorari of the reinstatement of the *Kiyemba* petition. *See* Larkin Reynolds, *Supreme Court Denies Cert. in* Kiyemba, LAWFARE (Apr. 18, 2011, 10:45 AM), http://www.lawfareblog.com/2011/04/supreme-court-denies-cert-in-kiyemba/ (citing Justice Breyer's statement explaining the changed circumstances that led to Court's denial of certiorari).

[32] Upon remand from the Supreme Court, the D.C. Circuit granted the government's motion to reinstate the judgment and "reinstate[d]" its original opinion. Kiyemba v. Obama, 605 F.3d 1046, 1047 (D.C. Cir. 2010) (per curiam). The Court of Appeals noted that its original decision had been made after the United States had already received one offer of resettlement for the Uighurs, and thus that the "posture of the case" on remand was not "materially different." *Id.* Judge Rogers concurred, noting that the settlement offer proffered by the government prior to the original decision had not included an "independent determination that [the country making the offer] was otherwise appropriate for resettlement." *Id.* at 1049 (Rogers, J., concurring) (internal quotation marks omitted). She then observed that the resettlement offers received after the decision had been determined to be "appropriate." *Id.* at 1050 n.3. In light of these resettlement offers, Judge Rogers believed that the "[p]etitioners' claim of constitutional entitlement to release in the continental United States pending resettlement abroad has thus been overtaken by events." *Id.* at 1052. The Supreme Court denied hearing this case, but Justices Breyer, Kennedy, Ginsburg, and Sotomayor wrote a separate statement expressing agreement with the reasoning of Judge Rogers's concurrence. Kiyemba v. Obama, 131 S. Ct. 1631 (2011).

[33] *See* Jonathan Hafetz, *A Tale of Two Writs*, CONCURRING OPINIONS (Mar. 2, 2011, 11:10 AM), http://www.concurringopinions.com/archives/2011/03/a-tale-of-two-writs.html ("*Kiyemba*, however, remains an affront to *Boumediene* regardless of what happens to the Uighurs because the holding is that it does not matter whether there is an available option: judges can never order release in any circumstance, and can do nothing other than accept the jailor's representation that it is attempting a diplomatic solution.").

to another country.[34] Regardless of what eventually happens to the Uighurs, the contention that U.S. law could allow the government to detain someone indefinitely despite having no legal basis for the initial detention is a radical proposition that requires comprehensive analysis.[35]

I
THE IMMIGRATION FRAMEWORK

The *Boumediene* Court noted that the right to release from indefinite detention is the standard relief available in habeas proceedings.[36] However, when the requested "release" involves noncitizens entering the United States, it implicates immigration law, which establishes a comprehensive constitutional and statutory framework to govern issues related to the territorial presence of noncitizens.

A. Plenary Power and the Entry Fiction

The control of the federal political branches over the terms and conditions of noncitizen entry into the United States began with the creation of the plenary power doctrine.[37] In its purest form, the doc-

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[34] *See, e.g.*, 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, 997–1000 (1995) (discussing inconsistencies and confusion in modern cases involving detention of inadmissible noncitizens).

[35] The Supreme Court may address the separation-of-powers analysis I discuss here regarding federal power to check executive action, if and when it confronts the D.C. Circuit's broad interpretation of *Munaf v. Geren*, decided on the same day as *Boumediene*. Munaf v. Geren, 553 U.S. 674, 689, 692, 695, 699–703 (2008) (discussing limitation on the judiciary's ability to second-guess executive determinations regarding where to transfer detainees). *Munaf* has come to "stand for the proposition that the question of who is tranferred [sic] from Guantánamo, and where, is a matter for the Executive Branch, without 'second-guessing' by the [federal] courts." Lyle Denniston, *Analysis: Major Fight Brews in* Munaf, SCOTUSBLOG (July 1, 2010, 8:23 PM), http://www.scotusblog.com/2010/07/analysis-major-fight-brews-on-munaf/; *see also* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 973 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)) (describing application of *Munaf* to the decision in Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009), to reject the Uighurs' application for notice and the right to be heard prior to transfer to a third country).

[36] *See* Boumediene v. Bush, 553 U.S. 723, 779 (2008) ("[W]here imprisonment is unlawful, the court 'can only direct [the prisoner] to be discharged.'" (quoting *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 136 (1807))).

[37] The term "plenary power" in this Note refers specifically to the powers available to the political branches over immigration. Keep in mind, however, that other powers are also referred to as "plenary," such as Congress's power over the regulation of interstate commerce. *See, e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4 (1999) (describing congressional power over taxation as "plenary"); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 478 (2009) (comparing immigration plenary power with plenary power over commerce as established in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

trine asserts that admission decisions made by the political branches are "conclusive upon the judiciary"[38] and that their appropriateness is "not [a] question[ ] for judicial determination."[39]

Even in the early days of the plenary power doctrine, the Court recognized that individuals who were present in the United States had greater equitable claims to rights and process than those outside the country.[40] The Court established that noncitizens within the territorial United States were entitled to some constitutional protections, although Congress retained the right to deport them if "necessary or expedient for the public interest."[41] The Court's territorial distinction was intertwined with the limited role of judicial review: "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil[e] or residence within the United States, nor even been admitted into the country pursuant to law . . . be permitted to enter . . . ."[42]

This territorial distinction alone failed to fully address the different equitable claims brought by various noncitizens. One problematic result of the entry fiction was that individuals who entered illicitly and were physically present received more procedural protection in their removal proceedings than those who had applied for admission legally but were denied entry.[43] Another issue arose regarding legal

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[38] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

[39] *Id.* at 609; *see also* Cox & Rodriguez, *supra* note 37, at 467 ("The conception of the United States government that emerges from this case thus has a decidedly unitary cast: the legislative and executive branches form a single political department with responsibility for determining 'who shall compose [society's] members.'" (quoting *Chae Chan Ping*, 130 U.S. at 607)). Note that the distribution of authority *between* the political branches has not been thoroughly explored by the Supreme Court. Cox & Rodriguez, *supra* note 37, at 460.

[40] *Compare* Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (determining that, as to individuals without some sort of demonstrable connection to United States, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"), *with* Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893) ("[Noncitizens] residing in the United States . . . are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws . . . .").

[41] *Fong Yue Ting*, 149 U.S. at 724; *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 555 n.48 (1990) (listing several cases that suggest noncitizens in the United States are guaranteed some element of procedural due process in deportation proceedings).

[42] *Ekiu*, 142 U.S. at 660.

[43] For example, in *Yamataya v. Fisher*, the Court ruled that an individual who entered illegally and was present in the United States for only four days was entitled to procedural due process, although she would have no such entitlement if she had been excluded at the border. 189 U.S. 86, 87–88, 101 (1903). Congress addressed this criticism of the entry fiction in 1996 by changing the trigger for the territorial distinction. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (amending the Immigration and Nationality Act), Congress established that the enhanced

residents who left the country and then sought to reenter. Initially, the Court presumed that noncitizen residents who left the United States were considered to "reenter" on their return, depriving them of the additional procedures to which they would have been entitled had they never left.[44] However, when the Court confronted the inequity of depriving people with longstanding ties to the United States of any meaningful process, it established what one might refer to as a "reentry" myth: Long-term residents who left were considered not to have departed if their absence was "innocent, casual, and brief."[45] Thus, the entry fiction developed over time as a check on the severity of the plenary power doctrine, but it has struggled to comprehensively distinguish between the equitable claims of differently situated noncitizens.

In *Shaughnessy v. United States ex rel. Mezei*,[46] the Supreme Court adhered to both the entry fiction and the limited judicial review components of the plenary power doctrine, even in the face of a potentially indefinite detention. Three years earlier, the Court had affirmed the vitality of the entry fiction, proclaiming that "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[47] That case, however, involved a German citizen who had never been present

statutory protections provided to those who had entered were now only available to those who had been "admitted," which requires "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13) (2006); *see also* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 395 & n.179 (2007) (discussing changes in immigration law under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). This change has many implications, but for purposes of this Note, it is enough to observe that the terms "excludable" and "inadmissible" apply to individuals who have not yet "entered" legally, though they may be territorially present. "Deportable" generally refers to those who have effected entry or admission and are thus entitled to greater procedural protections.

44 *See* Lem Moon Sing v. United States, 158 U.S. 538, 547–48 (1895) (explaining that when an alien voluntarily leaves the United States, he cannot reenter against the government's will).

45 Rosenberg v. Fleuti, 374 U.S. 449, 461–62 (1963) (holding that an "innocent, casual, and brief" departure from the United States by a lawful permanent resident will not result in "entry" upon return unless the resident had an intent to depart which was "meaningfully interruptive of the alien's permanent residence"); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 598–99 (1953) (determining resident seaman was "deportable" rather than "excludable" despite a five-month absence); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 814–17 (1997) (summarizing modern developments regarding the definition of "entry").

46 345 U.S. 206 (1953).

47 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

in the United States, while the defendant in *Mezei* had lived in the United States for twenty-five years before departing to visit his dying mother in Romania.[48] Justice Clark proclaimed Mezei's nineteen months "behind the Iron Curtain" as a "clear break" in his continuous residence, reducing Mezei to the status of an arriving noncitizen.[49] Thus, the Court could justify refusing to review the Executive's summary exclusion of Mezei on national security grounds.[50]

The Court's deference to the Executive was particularly significant because no other country would allow Mezei to enter, thus leaving him in potentially indefinite detention on Ellis Island.[51] Justice Clark admitted that "exclusion by the United States plus other nations' inhospitality results in present hardship [that] cannot be ignored," but reiterated that the plenary power doctrine prevents the judiciary from providing meaningful review to those who seek entry.[52] Thus, the Court upheld an executive determination despite the fact that it could result in prolonged detention.[53] Despite vitriolic dissents and immediate criticism from legal commentators,[54] *Mezei* stands as one of "the Supreme Court's fullest statements of the plenary power doctrine and the entry fiction."[55] The criticism has continued over the years,[56] but *Mezei* has never been explicitly overruled.[57]

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[48] *Mezei*, 345 U.S. at 208; *see also* United States *ex rel.* Mezei v. Shaughnessy, 101 F. Supp. 66, 67 (S.D.N.Y. 1951), *aff'd in part*, *rev'd in part*, 195 F.2d 964 (2d Cir. 1952), *rev'd*, 345 U.S. 206 (1953) (noting that Mezei visited Europe in 1948 to see his dying mother).

[49] *Mezei*, 345 U.S. at 214.

[50] *Id.* at 214–15 ("That being so, the Attorney General may lawfully exclude respondent without a hearing as authorized by the emergency regulations promulgated pursuant to the Passport Act. Nor need he disclose the evidence upon which that determination rests." (citing *Knauff*, 338 U.S. at 543)).

[51] *See id.* at 208–09 ("Twice he shipped out to return whence he came; France and Great Britain refused him permission to land. The State Department has unsuccessfully negotiated with Hungary for his readmission. Respondent personally applied for entry to about a dozen Latin American countries but all turned him down.").

[52] *See id.* at 216 ("[R]espondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." (citing Harisiades v. Shaughnessy, 342 U.S. 580, 590–91 (1952))).

[53] Mezei's indefinite detention on Ellis Island came to an end when the Attorney General granted him parole into the United States. Weisselberg, *supra* note 34, at 983–84 & nn.264–65 (describing Attorney General's decision to parole Mezei).

[54] *See* Weisselberg, *supra* note 34, at 985 n.267 (collecting examples of contemporary criticism of *Knauff* and *Mezei* decisions); *see also* Peter J. Spiro, *Explaining the End of the Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 n.3 (2002) (citing examples of academic critiques of plenary power doctrine); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1140 n.267 (1995) (collecting examples of the "cottage industry of academic criticism" occasioned by *Knauff* and *Mezei*).

[55] Weisselberg, *supra* note 34, at 985.

[56] *See, e.g.*, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989) ("Immigration law has remained blissfully untouched by

Despite *Mezei*'s continued vitality, the Supreme Court recently suggested that the application of the plenary power doctrine to potentially indefinite detention might be more complicated than its analysis in *Mezei* would suggest. In *Zadvydas v. Davis*,[58] two long-time residents who were detained, but could not be deported to any other country, challenged their potentially indefinite detention.[59] The Court did not officially recognize a substantive due process liberty interest in *Zadvydas*, but it interpreted the statute in question to avoid deciding whether any such rights would be violated by indefinite detention.[60] The Court determined that an individual who has "no significant likelihood of removal in the reasonably foreseeable future" must be released after six months of post-removal-order detention.[61]

The Court could have used this opportunity to eviscerate the inequities of the territorial distinction seen in *Mezei*,[62] but the

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the virtual revolution in constitutional law since World War II, impervious to developments in due process, equal protection and criminal procedure."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 3 (1984) ("The currents that have transfigured constitutional jurisprudence, administrative law, civil rights, and judicial ideology since the New Deal, and especially since the 1960's, have largely passed immigration law by, leaving it to navigate its own course." (citation omitted)); Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1019 (2007) ("[T]he denial of constitutional rights to aliens stopped at the U.S. border is one of the major reasons why immigration law has long been notorious for its failure to comply with the rule of law and its isolation from other areas of public law.").

[57] *See, e.g.*, Rosales-Garcia v. Holland, 322 F.3d 386, 409–15 (6th Cir. 2003) (determining that *Mezei*'s seeming acceptance of indefinite detention of noncitizens has been undermined by subsequent constitutional due process decisions, although not overruled).

[58] 533 U.S. 678 (2001).

[59] *Id.* at 684–86. The statute in question provided that both inadmissible citizens and admitted noncitizens ordered to be removed on certain criminal grounds "shall" be detained for ninety days (the removal period as defined by Immigration and Nationality Act § 241(a)(1), 8 U.S.C. § 1231(a)(1) (2006)) and that the Attorney General "may" detain certain categories of individuals beyond the removal period. *Compare* 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien."), *with* 8 U.S.C. § 1231(a)(6) ("An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period . . . .").

[60] *Zadvydas*, 533 U.S. at 689 ("In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.").

[61] *Id.* at 701.

[62] *See Zadvydas*, 533 U.S. at 694 (citing Brief for Lawyers' Committee for International Human Rights as Amicus Curiae Supporting Respondent Kim Ho Ma at 15–20, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 00-38)).

majority chose to distinguish *Mezei* instead.[63] Thus, Justice Breyer did not have to confront the plenary power doctrine in reaching review of the claims presented.[64] He did note, however, that the plenary power doctrine was subject to "important constitutional limitations," arguably the Supreme Court's most direct limit on the principle of plenary power to date.[65] This allowed him to apply "[o]rdinary principles of judicial review," which included an implicit balancing between the Executive's traditional prerogative regarding post-removal-order detention and longstanding concerns about permitting indefinite executive detention.[66] While *Zadvydas* was not a constitutional decision, the Court's tortured reading of the statute and avoidance of the constitutional question[67] suggest that the constitutional implications of indefinite detention are fairly significant.[68]

A few years later, the Court further complicated the "entry fiction" by extending its tortured statutory interpretation to noncitizens who had not effected entry and who were detained indefinitely under

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[63] Justice Breyer determined that the petitioners' admission and presence in the United States when removal proceedings began established them as territorially protected noncitizens. *Id.* at 693–94. Thus, *Zadvydas* stands for the proposition that the entry fiction is alive and well in the modern era. However, individuals who have been admitted do not lose that status until they have physically been removed; simply being deemed eligible for removal is insufficient.

[64] *See* Spiro, *supra* note 54, at 344 (describing how the *Zadvydas* Court avoided directly confronting the constitutional question of plenary power).

[65] *Zadvydas*, 533 U.S. at 695; *see also* Spiro, *supra* note 54, at 344 (noting that the Court in *Zadvydas* characterized the plenary power doctrine as subjecting the exercise of the immigration power to "important constitutional limitations"). *But see* INS v. Chadha, 462 U.S. 919, 940–45 (1983) (locating the immigration power in the text of the Constitution rather than in broad notions of sovereignty, and then reviewing congressional use of the legislative veto as a violation of separation of powers). One scholar notes that *Chadha* can be distinguished as a procedural case, analogous to the procedural due process cases which have already eviscerated a judicially unreviewable plenary power. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 303. He also notes that the precedent might be limited to claims based on separation-of-powers principles. *Id.*; *see also* Slocum, *supra* note 43, at 388 (suggesting a pattern whereby "the government does not seem to receive the benefit of the plenary power doctrine in cases involving a claim that a statute violates a structural provision of the Constitution, rather than an amendment to the Constitution"). However, since the Uighurs' case implicates structural separation-of-powers concerns, *Chadha* might shed light on judicial power to review immigration decisions for separation-of-powers violations.

[66] *Zadvydas*, 533 U.S. at 700.

[67] Despite the fact that the statute had no explicit limitation regarding how long detention might be permissible, the Court "read an implicit limitation" of six months as a reasonable interpretation of how long a noncitizen could be detained if there was no "significant likelihood of removal in the reasonably foreseeable future." *Id.* at 689, 701.

[68] *But see* Demore v. Kim, 538 U.S. 510, 521–23 (2003) (citing traditional plenary power cases to uphold the mandatory detention of criminal resident noncitizens during their removal proceedings).

the same statute challenged in *Zadvydas*. In *Clark v. Martinez*,[69] Justice Scalia held that the statute did not distinguish between inadmissible noncitizens and other noncitizens, and thus that the same limitations on detention should apply to all individuals detained under it.[70] Justice Scalia dismissed the idea that the Court must independently evaluate whether the detention of inadmissible noncitizens would raise constitutional questions similar to those avoided in *Zadvydas*.[71] After the Court determined that the statute as interpreted provided no basis for indefinite detention, the noncitizens at issue were released into the country on parole.[72]

Zadvydas and *Clark* reflect a longstanding uncertainty about the validity of the entry fiction specifically, and about the plenary power doctrine more broadly. Nonetheless, the plenary power doctrine and the distinction between the rights of those who have been "admitted" and those who remain on the threshold of entry—physically or fictively—comprise the basic framework of immigration law.[73]

B. The Parole Power

In many ways, the parole power serves as another prudential counterpoint to the strictures of the plenary power doctrine. After *Mezei*, the summary exclusion procedure at issue "fell into disfavor," and the government began paroling the majority of arriving applicants

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[69] 543 U.S. 371 (2005).

[70] *See id.* at 378 ("The operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one."); *supra* note 59 (describing relevant statute).

[71] *Id.* at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation."). Circuit court decisions upholding the Attorney General's right to detain inadmissible noncitizens indefinitely, both before and after the 1996 restructuring, include *Sierra v. Romaine*, 347 F.3d 559, 576 (3d Cir. 2003) (determining that temporal limitation on detention does not apply to inadmissible noncitizens); *Borrero v. Aljets*, 325 F.3d 1003, 1007 (8th Cir. 2003) (holding that the *Zadvydas* limits on detention are "inapplicable to inadmissible aliens"); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1445 (9th Cir. 1995) (finding that the "overall structure" of the statute assumed the Attorney General had such authority); *Gisbert v. U.S. Attorney Gen.*, 988 F.2d 1437, 1442, 1444 (5th Cir. 1993) (holding that the indefinite detention of excludable noncitizens does not violate their substantive or procedural due process rights).

[72] For further discussion of the remedy granted to the *Clark* detainees, see *infra* note 159.

[73] *See, e.g.*, Samirah v. Holder, 627 F.3d 652, 654–56 (7th Cir. 2010) (wrestling with how the concept of "advance parole" fits into framework of entry and admission).

for entry into the country pending their exclusion hearings.[74] This was not unprecedented; the government had been paroling individuals into the United States for decades.[75] The Supreme Court assumed the validity of the executive parole power in *Kaplan v. Tod*[76] without any mention of what legal authority granted such power.[77] Justice Holmes's opinion described the essence of the parole power: An individual paroled into the United States is "regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared."[78] The paroled noncitizen has made no entry and thus receives only the procedures granted to those in exclusion proceedings.[79] Parole is currently defined as the antithesis of admission: "An alien who is paroled under section 1182(d)(5) of this title . . . shall not be considered to have been admitted."[80]

The original Immigration and Nationality Act in 1952 codified the parole power.[81] The statute expressly authorized the Attorney General to parole noncitizens "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest."[82] As more and more individuals were paroled into the United States, parolees began to argue that their long residence justified treating them like other individuals who had effected entry. The Court in *Leng May Ma v. Barber*[83] rejected that proposition:

> The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally "within the United States" is inconsistent with the congressional mandate,

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74 Taylor, *supra* note 54, at 1139–40 ("The detention of excludable aliens also became rare; the government closed Ellis Island and began paroling virtually all applicants for entry while they awaited an administrative hearing.").

75 Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925, 938 (1984) ("Although parole power was not statutorily authorized until 1952, the executive branch used it long before then."); *id.* at 938 n.62 (discussing mention of the parole process in Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).

76 267 U.S. 228 (1925).

77 *Id.* at 230.

78 *Id.*

79 *Id.* at 231 ("[A]ppellant never has entered the United States within the meaning of the law.").

80 8 U.S.C. § 1101(a)(13)(b) (2006).

81 8 U.S.C. §§ 1101–1537 (1952).

82 *Id.* § 1182(d)(5).

83 357 U.S. 185 (1958).

> the administrative concept of parole, and the decisions of this Court.[84]

Thus, the parole power, which was created out of administrative necessity, gained statutory and precedential imprimatur as something entirely distinct from admission.

The executive branch soon broadly and controversially took advantage of the discretion inherent in the parole statute. In the wake of the repressive Soviet response to the Hungarian Revolution of 1956, President Eisenhower paroled thousands of Hungarian refugees into the country despite the fact that the Hungarian quota for the year had been filled.[85] Thereafter, the President began to use the parole power as a critical tool in American refugee policy.[86] This exercise of the parole power upset the carefully calibrated congressional scheme for admission, and Congress eventually responded by passing the Refugee Act of 1980.[87] However, the President continued to use the statutory parole power to address large-scale international incidents, including the Mariel boatlift.[88]

Currently, the President's flexible use of the parole power is not limited to the refugee context. The current statutory encapsulation of the parole power belies the variety of applications for which the executive branch uses it. 8 U.S.C. § 1882(d)(5)(A) establishes the following:

> The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the

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[84] *Id.* at 190.

[85] THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 508 (5th ed. 2003); Cox & Rodriguez, *supra* note 37, at 502.

[86] *See* GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 55–56, 68–69, 85 (1986) (discussing various presidential invocations of the parole power).

[87] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.) (establishing a comprehensive system for humanitarian admission of refugees); *see* Boswell, *supra* note 75, at 941 n.70 ("The exercise of the parole authority in refugee situations has received major criticism that played an important role in the enactment of the Refugee Act of 1980 . . . ."); Cox & Rodriguez, *supra* note 37, at 502–03 (discussing congressional displeasure with executive use of the parole power and claiming that "Congress's dissatisfaction with this use of parole and its desire to exert more control over refugee policy helped prompt the passage of the Refugee Act of 1980").

[88] Shortly after the passage of the Refugee Act, over 125,000 Cubans arrived on the southern coast of Florida and were paroled into the United States. Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans: Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1736 (1989) ("By August 1981, the Attorney General had 'paroled' approximately 123,000 of the Mariel Cubans.").

> United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.[89]

On the face of the statute, this authority appears to be limited. However, the statute is currently used to parole individuals into the United States well beyond its textual boundaries. The United States Citizenship and Immigration Services website describes several types of parole, including (1) deferred inspection; (2) advance parole; (3) port-of-entry parole; (4) humanitarian parole; (5) significant public benefit parole; and (6) overseas parole.[90] Regulations provide authority for the Attorney General to parole inadmissible noncitizens into the United States as an alternative to detention before removal hearings.[91] When Congress has intended to circumscribe this broad discretion, it has specifically created higher hurdles.[92]

One example of parole that illustrates how broadly the statute has been interpreted is "significant public benefit" parole, "generally used for aliens who enter to take part in legal proceedings when there is a benefit to the government."[93] The legislative history behind this particular use of parole reveals that the Attorney General requested

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[89] 8 U.S.C. § 1182(d)(5)(A) (2006). The Refugee Act of 1980 added Subsection B in order to "close[ ] the refugee-parole loophole." Mary Jane LaPointe, *Discrimination in Asylum Law: The Implications of* Jean v. Nelson, 62 IND. L.J. 127, 134 (1986); *see also* § 1182(d)(5)(B) ("The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee . . . .").

[90] Parolee (definition), U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/ (follow "Resources" hyperlink; then follow "Glossary" hyperlink; then follow "P" hyperlink; then follow "Parolee" hyperlink) (last visited Aug. 14, 2011). This website constitutes the government's clearest admission that multiple forms of parole exist and are consistently used.

[91] 8 C.F.R. § 212.5(b) (2010) (setting out categories of detained individuals who might qualify for parole); *see also* Paul Wickham Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305, 311–12 (1997) (noting that parole for deportable noncitizens is set out in the statute, while parole for inadmissible noncitizens is established in the parole regulations).

[92] *See* 8 U.S.C. § 1182(d)(5)(B) (limiting the Attorney General's ability to parole refugees); *id.* § 1184 (f)(1)–(2) (establishing that the Attorney General may not parole crewmembers of vessels or aircraft, if they will work for an employer who is engaged in a labor strike or lockout, unless such parole "is necessary to protect the national security of the United States").

[93] *See* Parolee (definition), *supra* note 90 (defining significant public benefit parole as "generally used for aliens who enter to take part in legal proceedings when there is a benefit to the government").

the authority to parole noncitizens for "purposes of prosecution."[94] These individuals, however, do not have to be, and often are not, "applying for admission" as the statute suggests might be required.[95] Also not mentioned in the statute is the Attorney General's vast power to prescribe "terms and conditions" related to an individual's parole, particularly those ensuring the noncitizen's presence at hearings or eventual deportation.[96] This ability to fashion particular terms and conditions of parole is a significant part of the flexibility that makes the parole power so valuable to the Executive.[97]

Courts and scholars have criticized the common use of the parole power in combination with courts' continued resistance to softening the application of the entry fiction to parolees who have been in the country for years.[98] Nonetheless, like the plenary power doctrine, the parole power and its reflection of the entry fiction are firmly rooted in immigration law as antidotes to the much more limited, congressionally-controlled admission power.

The outer boundaries of the parole power, however, remain unexplored. Two questions remain. First, is the parole power vested solely in the hands of the Executive? Second, is the parole power a necessary correlate to the admission power, such that it is encompassed by the plenary power and thus judicially unreviewable? While neither question has been directly addressed by the Supreme Court,

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[94] K-, 9 I. & N. Dec. 143, 157 (A.G. 1961) (exclusion proceeding) (quoting S. REP. NO. 82-1137, at 12–13 (1952)).

[95] *See* Wang Zong Xiao v. Reno (*Wang I*), 837 F. Supp. 1506, 1562 (N.D. Cal. 1993) ("'Applying for admission' is a term of art in the [Immigration & Nationality Act]. It refers to the alien's presence at the border of the United States, not to her or his subjective wish to come here." (citing Clark v. Smith, 967 F.2d 1329, 1331–32 (9th Cir. 1992))), *aff'd*, 81 F.3d 808 (9th Cir. 1996); Accardi, 14 I. & N. Dec. 367, 369 (B.I.A. 1973) (exclusion proceeding) (noting that parole into the United States for purposes of prosecution means an individual "never accomplished an entry into the United States").

[96] 8 C.F.R. § 212.5(c) ("[O]fficials . . . may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate."); *see also* § 212.5(d) (noting that officials "may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so").

[97] *See* Jean v. Nelson, 472 U.S. 846, 878 (1985) (disclaiming concerns that petitioners would remain in the United States inevitably by noting that "parole could be terminated at any time at the discretion of the Attorney General, and their admissibility would then be determined at exclusion proceedings just as if they had never been paroled").

[98] *See, e.g.*, Stellas v. Esperdy, 250 F. Supp. 85, 87 (S.D.N.Y. 1966) (upholding lack of constitutional rights to parolee while observing that "[i]ndeed the legal fiction strains credulity where, as here, one 'stopped at the boundary line' has nevertheless managed to marry and to father two children in the United States"); Boswell, *supra* note 75, at 940 ("Although the Government legitimately needs the exclusion power, it should not exercise the power to create an unrealistic notion of entry into the United States that is based entirely on a legal fiction.").

the general practice in the lower courts, as discussed in Part II.B, suggests that the judiciary has some power to grant parole against the will of the Executive, and that parole determinations are not analyzed under the plenary power framework in the same way as admission decisions.

II
The Remedial Confusion and Why It Matters

A. The Uighurs' Original Petition for Habeas Corpus

As the discussion above makes clear, the boundaries and nuances of the plenary power doctrine are unclear. Confusion about the scope of these powers and how they should be applied is illustrated by three judicial opinions that address different remedies that could and should be granted to the Uighurs.

1. In re Guantánamo Bay Detainee Litigation*: "Release" Granted*

In *In re Guantánamo Bay Detainee Litigation*,[99] the Uighur petitioners requested judgment on their habeas petitions "ordering [their] release into the continental United States."[100] Judge Urbina's decision for the district court was styled as a "Memorandum Opinion Granting the Petitioners' Motions for Judgment on Their Pending Habeas Petitions and Denying as Moot the Petitioners' Motions for Immediate Release on Parole into the United States."[101] However, it never specified the "release" granted or how it would work in practice.

The district court reached the remedial question only after determining that the Uighurs' continued detention was unlawful and that further detention was effectively indefinite.[102] Judge Urbina believed that the plenary power doctrine limited his judicial power to grant

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[99] 581 F. Supp. 2d 33 (D.D.C. 2008).

[100] Huzaifa Parhat's Motion for Judgment on His Habeas Petition Ordering Release into the Continental United States, *supra* note 15, at 1; Motion of Abdul Sabour, Abdul Nasser, Hammad Memet, Edham Mamet, Arkin Mahmud, Bahtiyar Mahnut, Ahmad Tourson, Abdur Razakah, Anwar Hassan, Dawat Abdurehim, Abdul Ghappar, Abdul Rahman, and Adel Noori for Immediate Release on Parole into the Continental United States Pending Final Judgment on Their Habeas Petition at 1–2, *In re* Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33 (D.D.C. 2008) (No. 05-1509) (joining in Parhat's motion for immediate release on parole and motion for judgment ordering release).

[101] *In re Guantánamo Bay*, 581 F. Supp. 2d at 34. The motion for immediate release on parole had sought release pending further habeas proceedings and was thus mooted when Judge Urbina decided the petition on the merits.

[102] *See id.* at 36–39 (noting that government concession that Uighurs were not enemy combatants meant detention was not authorized under AUMF, and rejecting the idea that "wind-up" authority justified continued detention).

some form of "release," and he noted that Congress had delegated its broad immigration regulatory power exclusively to the executive branch to "parole and/or admit aliens."[103] Thus, Judge Urbina conflated the two distinct remedies outlined above. This explains why he then felt obligated to clarify why later cases had mitigated the extremism of the plenary power doctrine. Judge Urbina acknowledged that the admission of noncitizens was traditionally within the plenary, exclusive control of the political branches,[104] but asserted that such powers were "not absolute."[105] He proclaimed, "Such absolute deference cannot bear the weight of precedent and reasonable constitutional construction."[106] These words suggest that Judge Urbina believed he did have the power to order "admission" into the United States, due to what he deemed "exceptional" circumstances.[107] Considering his conflation of the two remedies, and his concession that the plenary power framework was appropriate, he could only grant release by confronting the limits of the plenary power doctrine directly.[108]

Having determined that the plenary power doctrine did not prevent the court from weighing the separation-of-powers concerns as it saw fit, the district court concluded that "separation-of-powers concerns do not trump the very principle upon which this nation was founded—the unalienable right to liberty."[109] The court ordered the government to release the petitioners into the United States.[110] Thus, one can construe Judge Urbina's opinion as questioning the limits that the plenary power doctrine places on the judiciary's ability to make "admission" determinations.

2. Kiyemba v. Obama*: Relief Denied*

On review, the D.C. Circuit did not address the district court's determination that the Executive lacked authority to continue detaining the Uighurs. The only aspect that mattered to the majority was that the plenary power doctrine prevented a habeas court from

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103 *Id.* at 40.

104 *See id.* ("[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

105 *Id.*

106 *Id.* at 42.

107 *See id.* at 40 (evaluating the government's contribution to the Uighurs' situation and determining that such factors affect appropriate separation-of-powers analysis).

108 *See id.* at 42 (criticizing extension of plenary power deference to "circumstances including indefinite detention without just cause").

109 *Id.* at 34.

110 *Id.*

granting the Uighurs *any* "release" into the United States in the absence of a law permitting the judiciary such power.[111] Thus, while Judge Urbina thought that the plenary power framework could be abandoned if there were justifiable reasons to look beyond valid congressional delegation of authority to the Executive, Judge Randolph rejected that theory and upheld the historical separation-of-powers theory embodied in the plenary power doctrine.[112]

Unlike the district court, which dismissed the plenary power cases with the proposition that such power was "not absolute,"[113] the majority in *Kiyemba* asserted that the long line of precedent ascribing to the political branches all power to determine the terms and conditions of noncitizen entry remained entirely unbroken.[114] It summarily dismissed the Uighurs' claim that *Zadvydas* and *Clark* had cabined the plenary power doctrine by recognizing that noncitizen liberty interests could trump statutory authority to detain if the detention became indefinite.[115] Instead, Judge Randolph dismissed both precedents as statutory interpretation cases that illuminated nothing about the constitutional issue.[116]

After confirming the plenary power doctrine's ongoing vitality, the majority then determined that the doctrine was the most appropriate separation-of-powers framework to apply. Judge Randolph declared it "not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[117] After declaring that no such express authorization existed, Judge Randolph then dismissed the idea that the "'exceptional' circumstances" identified in the dis-

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111 Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) ("The critical question is: [W]hat law 'expressly authorized' the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States and released in Washington, D.C.?"). The majority does not confront the fact that an interpretation denying any release to the Uighurs is in tension with the *Boumediene* Court's statement that the habeas court must grant *some* form of release. *See supra* note 13 and accompanying text (discussing *Boumediene*'s impact on habeas petitions).

112 *See Kiyemba*, 555 F.3d at 1026–27 (noting that the district court cited no authority for granting the Uighurs release into the United States and rejecting both a due process rationale and a right-remedy correlation).

113 *See supra* note 105 and accompanying text.

114 *See Kiyemba*, 555 F.3d at 1025–26 (citing fifteen cases for the proposition that "the Court has, without exception, sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms").

115 *Id.* at 1027–28.

116 *Id.* at 1028 (citing Clark v. Martinez, 543 U.S. 371, 386 (2005)).

117 *Id.* at 1026 (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)) (internal quotation marks omitted).

trict court's opinion were relevant to the remedial determination.[118] "[S]uch sentiments," he observed, "however high-minded, do not represent a legal basis for upsetting settled law and overriding the prerogatives of the political branches."[119]

The majority, like Judge Urbina, failed to explicitly clarify that it was addressing a grant of "admission" into the United States, but much of the opinion's language supports this proposition. For example, in response to the argument that any right must have a remedy, Judge Randolph retorted that an "alien who seeks *admission* to this country may not do so under any claim of right."[120] Later, the majority rejected the idea that the parole of noncitizens into the United States in *Zadvydas* and *Clark* "somehow undermined the plenary authority of the political branches over the entry and admission of aliens."[121] Finally, the Court explicitly noted that it saw the parole remedy as available only to individuals applying for admission.[122] These comments demonstrate that Judge Randolph did not necessarily intend to address parole as a distinct remedial possibility. Instead, he conflated the admission and parole remedies as inseparable and governed by the plenary power of the political branches to control presence in the United States.

Judge Rogers concurred in the majority's judgment remanding the case for further consideration.[123] She disagreed with Judge Urbina's first premise that the continued detention of the Uighurs was unlawful, a question not addressed by the majority.[124] Instead of merely noting her dispute regarding this antecedent question, Judge

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118 *Id.* at 1024 (quoting *In re* Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33, 40 (D.D.C. 2008)).

119 *Id.* at 1028–29.

120 *Id.* at 1027 (emphasis added) (quoting *Knauff*, 338 U.S. at 542) (internal quotation marks omitted). Note that the majority also disputed the underlying premise that a right must have a remedy. *Id.* at 1026–27.

121 *Id.* at 1028 n.12.

122 *Id.* at 1029 n.14 ("For the same reason, petitioners are not entitled to parole under 8 U.S.C. § 1182(d)(5)(A), a remedy that can be granted only to an applicant for admission and only in the exclusive discretion of the Secretary of Homeland Security."); *see also id.* at 1031 ("The parole remedy, 8 U.S.C. § 1182(d)(5)(A), not only is granted in the exclusive discretion of the Secretary of Homeland Security, but also is specifically limited to 'any alien applying for admission.'"). As discussed above, this is an inaccurate statement of the law of parole. *See supra* note 95 and accompanying text (noting that such language is used as a term of art).

123 *Kiyemba*, 555 F.3d at 1034 (Rogers, J., concurring).

124 *Id.* at 1038 ("Because the district court prematurely determined the petitioners were entitled to be released into the country prior to ascertaining whether the Executive, as asserted, would have lawful grounds to detain them under the immigration statutes, I concur with the judgment and would remand the case so that the district court could so ascertain.").

Rogers offered her own interpretation of the plenary power doctrine and the appropriate separation-of-powers analysis. While she did not question the relevance of the plenary power generally, she argued that the power was *congressional*, not executive.[125] Using this analysis, Judge Rogers concluded that in the absence of a congressionally-created power to detain the Uighurs, a court that found their detention to be effectively indefinite "would have the power to order them *conditionally released* into the country."[126]

As discussed above, the term "conditional release" does not necessarily indicate what remedy Judge Rogers believed could be granted. However, she explicitly acknowledged that there might be a meaningful remedial distinction between "admission" and "parole."[127] Judge Rogers then suggested that the Supreme Court in *Clark* confirmed the validity of a parole remedy in a habeas proceeding by ordering the inadmissible noncitizens to be released into the United States once their detention was deemed indefinite.[128] Thus, Judge Rogers evaluated the Uighurs' claim under a parole rubric, while her colleagues either approached the requested remedy as admission or refused to acknowledge the difference between the two concepts.

This Section illustrates the confusion and uncertainty among the courts that have addressed the Uighurs' claims. However, judges are not the only institutional participants demonstrating uncertainty about what remedy has been requested and how to apply the plenary power doctrine to such requests. The litigants on both sides have equivocated and punted on the issue of exactly what remedy is at stake.[129] One

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[125] *Id.* at 1035 ("[T]he Executive's authority to exclude and remove aliens, and to detain them to effect that end, must come from an explicit congressional delegation . . . ."). In this fashion, Judge Rogers's concurrence highlighted the fact that the Supreme Court's plenary power decisions have never fully explicated the appropriate division of immigration authority between the political branches. *See* Cox & Rodriguez, *supra* note 37, at 460–61 (pointing to the Supreme Court's failure to articulate effectively the division of authority).

[126] *Kiyemba*, 555 F.3d at 1038–39 (emphasis added).

[127] Judge Rogers accused the majority of "conflat[ing] the power of the Executive to classify an alien as 'admitted' within the meaning of the immigration statutes, and the power of the habeas court to allow an alien physically into the country." *Id.* at 1036.

[128] *Id.* at 1037 ("But the Supreme Court in *Clark* makes clear that a district court has exactly the power that the majority today finds lacking—the power to order an unadmitted alien released into the United States when detention would otherwise be indefinite." (citing Clark v. Martinez, 543 U.S. 371, 386–87 (2005))).

[129] The litigating positions of the Uighurs and the government have changed over time. The government's opening brief in the D.C. Circuit focused entirely on challenging what it perceived to be Judge Urbina's order of "admission." Brief for Appellants at 23, Kiyemba v. Bush, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429 (D.C. Cir. Oct. 24, 2008) ("When an alien who is outside the United States seeks *admission* to this country, the decision of the political branches to exclude that alien is conclusive and judicially unreviewable." (emphasis added)). The Uighurs responded that they had not been granted entry or admission, and implied they had been paroled instead. Corrected Brief of

point is clear from the opinions addressing the Uighurs' claims: All parties involved are extremely unsure of exactly how immigration law interacts with potentially indefinite executive detention for the purposes of national security.

B. The Remedial Significance of Requesting Parole Instead of Admission

I have suggested that the dispute among the litigants and judges about the remedy in question is key to resolving this case. If the Uighurs' request for release is actually a request for admission under the immigration laws, decades of precedent suggest that judicial interference in an area that has been historically insulated from court review would be inappropriate. Though countless scholars have argued that the plenary power doctrine has been misconstrued, limited in scope, or effectively overturned,[130] the Supreme Court has not yet definitively recognized limitations on the doctrine. More importantly, neither the Supreme Court nor the lower federal courts have ever granted admission to the United States as a remedy.

The lower courts have, however, granted parole into the United States in a number of cases. Current literature has not explored this category of cases—in which the judiciary, under various claims of right and as a remedy for various wrongs, has ordered an individual to be present in the United States without triggering admission under the immigration laws. A comprehensive survey of all such cases is beyond the scope of this Note. However, I explore a number of such cases as examples below.

The significance of these cases is twofold. First, these cases disprove the D.C. Circuit's proposition in *Kiyemba* that no court has

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Petitioners-Appellees at 27–28, Bush v. Kiyemba, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429 (D.C. Cir. Nov. 3, 2008). In its response, the government began to conflate the two remedies. *See* Reply Brief for Appellants at 7, Kiyemba v. Bush, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429 (D.C. Cir. Nov. 7, 2008) (arguing that "the separation-of-powers injury is the same" whether the court "purports to order an alien's admission into this country or instead orders the Executive to exercise its discretionary power to grant the alien parole").

130 *See, e.g.*, Legomsky, *supra* note 65, at 303 ("We have entered a new phase in the life of the plenary power doctrine. This stage is characterized by a judicial willingness, so far episodic, to cut away at the notion of plenary congressional power over immigration. The assaults have come from several directions."); Spiro, *supra* note 54, at 345–55 (arguing that plenary power will become nothing more than a "foreign relations imperative"). *See generally* Maureen Callahan VanderMay, *The Misunderstood Origins of the Plenary Power Doctrine*, 35 WILLAMETTE L. REV. 147 (1999) (arguing that the foundational cases for the plenary power doctrine have been misconstrued).

ever ordered an individual into the territorial United States.[131] Second, as discussed further in Part III, these cases illustrate that courts have been particularly willing to grant this remedy in cases where the executive branch has acted inappropriately.[132]

Several circuits have recognized their own jurisdiction to review administrative parole determinations.[133] The cases I highlight, however, each involve the grant of parole as a remedy for an independent legal violation. I will focus on two particular types of cases. First, I address cases in which a federal court has granted parole as equitable injunctive relief. Second, I review cases in which a court in statutory habeas proceedings has granted parole. Although the appropriate remedial scope of constitutional habeas is uncertain, this collection of cases provides valuable evidence that federal judges use the parole power primarily in unusual situations raising serious separation-of-powers concerns.

1. Parole as Federal Injunctive Relief

Generally, the federal district courts have "broad discretion in fashioning a remedy" once an individual establishes a claim for injunctive relief.[134] In particular, the judiciary has recognized "the important role of the federal courts in constraining misconduct by federal agents."[135] As early as 1956, the Ninth Circuit upheld an injunction which not only enjoined the Coast Guard from interfering with the employment of merchant seamen, but directed them to issue "documents showing they may be employed."[136] The court rejected the

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[131] *See Kiyemba*, 555 F.3d at 1028 ("[N]o habeas court since the time of Edward I ever ordered such an extraordinary remedy.").

[132] There are significant differences between the various facts of the underlying cases discussed here and those in *Kiyemba*. However, I am only evaluating the remedial possibilities available to the Uighurs. Thus, the relevant aspect of these cases is that they share a remedy: court-ordered entrance of a non-admitted individual into the territorial United States.

[133] *See, e.g.*, Sierra v. INS, 258 F.3d 1214, 1216–17 (10th Cir. 2001) (finding that the court had habeas jurisdiction to review a decision to withdraw parole despite 8 U.S.C. § 1252(a)(2)(B)(ii)); Jeanty v. Bulger, 204 F. Supp. 2d 1366, 1374 (S.D. Fla. 2002) (applying *Sierra* to detained asylum applicants seeking parole). Note that the Real ID Act of 2005 does not strip habeas jurisdiction over parole determinations because it only applies to federal habeas petitions that seek review of final orders of removal. *See* Nadarajah v. Gonzales, 443 F.3d 1069, 1075–76, 1083 (9th Cir. 2006) (reviewing administrative refusal to parole a noncitizen and determining that the agency abused its discretion in denying parole).

[134] Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 558 (9th Cir. 1990) (citing Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power . . . .")).

[135] *See id.* (upholding an injunction requiring INS to provide notice to Salvadoran detainees about the right to apply for political asylum and the right to counsel).

[136] Lester v. Parker, 235 F.2d 787, 789 (9th Cir. 1956).

Coast Guard's claim that this was "relief in the nature of mandamus which is beyond the jurisdiction of the district court."[137] Instead, the court explicitly linked the power to effectively create a remedy with the need to provide an adequate check on inappropriate uses of executive power:

> The rationale supporting the power of a court of equity to frame its injunctive decrees in such manner as to prevent their frustration is also the foundation for the rule that . . . the courts have power to protect individual rights against unlawful and unauthorized administrative power. The power and duty to protect such rights is fundamental; it springs from the very "existence of courts," and that is particularly true, where the right, as here, is a constitutional one.[138]

Thus, the separation-of-powers backdrop to the need for effective remedies was recognized forcefully and early in the context of federal injunctive relief.

Two recent Ninth Circuit cases illustrate that the broad injunctive relief available to federal courts encompasses the ability to order parole in extraordinary circumstances. In *Wang Zong Xiao v. Reno* (*Wang I*),[139] the district court issued a permanent injunction that prevented the government from rescinding the parole granted to Wang.[140] The United States had paroled Wang into the country so that he could testify in a criminal case against Leung, a major heroin smuggler, despite knowing that Wang's testimony against Leung was solicited using torture.[141] Wang was forced to choose between repeating lies the Chinese police elicited, as desired by the prosecutors, and thereby perjuring himself, or telling the truth and risking torture or execution upon his return to China.[142] Wang eventually testified and chose to tell the truth, which led to the declaration of a mistrial and great embarrassment for both China and the United States.[143] Shortly after this debacle, the Immigration and Naturalization Service (INS) decided to place Wang in exclusion proceedings and notified him that his parole had been terminated.[144]

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137 *Id.*

138 *Id.* at 790 (quoting Stark v. Wickard, 321 U.S. 288, 308 (1944)).

139 837 F. Supp. 1506 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808 (9th Cir. 1996).

140 *See id.* at 1563–64 (stating that granting Wang an injunction will "permanently enjoin defendants from taking any action in furtherance of removing [him] from the jurisdiction of the United States or of returning [him] to the custody of China or any representative of China").

141 William W. Tanner, *The Case of* Wang Zong Xiao v. Reno*: The International Implications of Prosecutorial Misconduct*, 24 GA. J. INT'L & COMP. L. 155, 155–57 (1994).

142 *Id.* at 158.

143 *Id.* at 159.

144 *Wang I*, 837 F. Supp. at 1539.

The government argued that Wang was not entitled to any relief because he, like other parolees, had never effected entry; thus, constitutional protections were limited.[145] The court rejected this argument because Wang's constitutional claim did not directly challenge the immigration laws. The court noted, "What Wang *does* challenge vis-a-vis his third cause of action are the actions certain government officials have taken that are *wholly independent* of the immigration laws."[146] On appeal, the Ninth Circuit determined that the injunction was within the district court's "inherent supervisory power to remedy extraordinary governmental misconduct."[147]

Later that year, the district court was forced to issue another injunction on Wang's behalf.[148] This time, the court ordered the INS to issue appropriate documentation to Wang which would allow him to work.[149] The government alleged that, since Wang had successfully argued that his parole case was not under the admission jurisdiction of the INA, the court could not then order the issuance of documents governed by that statute.[150] Judge Orrick rejected this jurisdictional claim, holding that the court's power to act in equity extended to this grant of relief as well.[151] *Wang III* sets up an important precedent suggesting that courts' ability to grant parole extends to review of the terms and conditions of parole placed on individuals once they receive it.

Two years later, the Ninth Circuit again upheld an injunction ordering the INS to take particular action—this time requiring it to parole individuals physically outside of the United States. In *Walters v. Reno*,[152] the district court issued a permanent injunction, attempting to remedy a procedural due process violation involving inadequate notice of deportation procedures to noncitizens charged

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145 *Id.* at 1548.

146 *Id.* at 1549. Using this reasoning, the court went on to uphold Wang's substantive due process claims. *Id.* This Note does not address the claims of entitlement to substantive due process made by several Guantánamo detainees in the wake of *Boumediene*. However, this case sheds interesting light on that question.

147 Wang Zong Xiao v. Reno (*Wang II*), 81 F.3d 808, 813 (9th Cir. 1996). The Ninth Circuit was also swayed by the fact that the government has a special "constitutional duty to protect a person when it creates a special relationship with that person, or when it affirmatively places that person in danger." *Id.* at 818.

148 Wang Zong Xiao v. Reno (*Wang III*), 930 F. Supp. 1377, 1377 (N.D. Cal. 1996).

149 *Id.* at 1380.

150 *Id.* at 1379.

151 *Id.* The court also proclaimed its dismay that this case was brought at all. *Id.* at 1380 n.3 ("The Court is shocked that it must order the government to do what, in justice, the government should long ago have volunteered to do: Give Wang the means to remain in this country after forcing him into exile from his own country.").

152 145 F.3d 1032 (9th Cir. 1998).

with document fraud.[153] Judge Reinhardt upheld a provision of the injunction that required the INS to "parole or make other arrangements for class members outside the United States to pursue reopened proceedings."[154] In language similar to that in *Wang III*, Judge Reinhardt noted that parole was a necessary element of a complete remedy to individuals who would otherwise be unable to attend hearings on their motions to reopen.[155]

In his opinion, Judge Reinhardt made two statements that inform our analysis. First, he only addressed the government's argument after first positing that he was "not at all certain" that the statutory provisions "governing the Attorney General's parole power impose limits on the federal courts' ability to remedy constitutional violations."[156] Second, Judge Reinhardt observed that parole for the purpose of remedying a constitutional violation clearly works a "significant public benefit" and thus falls within the scope of the statutory parole power.[157]

Despite the fact that the beneficiaries in *Walters* were physically outside of the United States and thus inadmissible, the district court and the appellate court did not feel that the plenary power doctrine constrained them in creating a parole remedy. One could argue that the court's sympathy was due to the beneficiaries' prior presence in the United States. That argument, however, is unpersuasive when one considers that Wang received similar relief despite the fact that he was originally paroled into the United States and thus never officially entered. The courts in these cases did not view themselves as constrained by either the plenary power doctrine or the entry fiction. Ordering parole as a remedy was justified by broader notions of

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153 *Id.* at 1036–37.

154 *Id.* at 1037.

155 *Id.* at 1050 ("Permitting the class members to reopen their proceedings is necessary in order to provide a suitable remedy for the INS's failure to give adequate notice. However, allowing class members to reopen their proceedings is basically meaningless if they are unable to attend the hearings that they were earlier denied."); *id.* at 1051 ("Without a provision requiring the government to admit individual class members into the United States so that they may attend the hearings to which they are entitled, the district court's injunction would be virtually meaningless."). The government did not challenge the judiciary's ability to grant parole generally, but instead suggested that the 1996 immigration reforms had amended the parole statute to forbid *classwide* grants of parole. *Id.* It is also relevant to note that the petition for certiorari to the Supreme Court did not challenge the portion of the injunction that required release. Petition for a Writ of Certiorari at I, Reno v. Walters, 526 U.S. 1003 (1999) (No. 98-730). The petition for certiorari was denied. *Walters*, 526 U.S. at 1003.

156 *Walters*, 145 F.3d at 1051.

157 *Id.* The statute allows the Attorney General to grant parole when there are "urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (2006).

equity and the sense that these parole rights were a necessary element of providing complete relief to individuals who had been wronged.

2. *Parole in Habeas Proceedings*

Parole has also been granted as a remedy in proceedings brought under the federal habeas corpus statute.[158] Generally, these cases reflect some of the same equitable concerns that seem to motivate judges in the injunctive relief cases.[159]

One such case is *Singh v. Waters*.[160] The INS deported Singh despite a motion for stay of deportation granted by an immigration judge.[161] The immigration judge found that Singh's motion to reopen was administratively closed because he was no longer in the country, and the district court dismissed Singh's petition for habeas corpus for lack of jurisdiction.[162] The appellate court declared Singh's deportation unlawful and directed the district court to grant "the writ of habeas corpus, ordering the INS not to violate the stay of deportation . . . and to permit Singh to return to the United States for the purpose of appearing at a hearing before the immigration judge to determine whether discretion to adjust his status should be favorably exercised."[163]

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158 28 U.S.C. § 1441 (2006).

159 I do not address the relief granted in *Clark v. Martinez*, 543 U.S. 371 (2005), because the various litigants in the *Kiyemba* cases have fully explicated the debate about whether it supports granting parole as relief. The petitioners argued that, despite the statutory nature of the claim, the relief granted was parole, and that was sufficient to prove that the judiciary has the power to grant such a remedy. *See* Corrected Brief of Petitioners-Appellees at 29, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009) (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429) ("*Martinez* rejected the same statutory, security, and separation-of-powers theories the Executive raises here."); Petition for Writ of Certiorari at 23, Kiyemba v. Obama, 131 S. Ct. 1631 (2011) (No. 10-775) (similar). The government argued that the posture of the case was solely statutory, so the remedial parole was therefore meaningless as an indicator of constitutional considerations. *See* Brief for Appellants at 18, 41, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009) (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429) ("[B]oth *Zadvydas* and *Clark* were decided on statutory grounds—with *Clark* specifically recognizing that the detention at issue there did not raise the same constitutional concerns as in *Zadvydas*. Accordingly, for purposes of assessing whether the Constitution authorizes a district court to order petitioners brought to the United States for release here, the guidance provided by their holdings, is inapposite."); Brief for the Respondents in Opposition at 22–23, Kiyemba v. Obama, 131 S. Ct. 1631 (2011) (No. 10-775) (similar). While the petitioners have the stronger argument, there can be no final resolution of this issue unless the Supreme Court decides to address it. Thus, I will merely state that I believe *Clark* stands as an example of a habeas court granting parole as a remedy and thus provides further evidence in support of my thesis.

160 87 F.3d 346 (9th Cir. 1996).

161 *Id.* at 347.

162 *Id.* at 348–49.

163 *Id.* at 350.

The Southern District of New York came to a similar conclusion in a case with similar facts. In *Ying Fong v. Ashcroft*,[164] Fong was also deported in violation of a court's stay of removal.[165] The government acknowledged that Judge Hellerstein had the power to grant Fong's petition and order her return to the United States.[166] The court did just that, ordering Fong's return so that she could pursue any administrative remedies available to her, specifying that "[n]o legal prejudice shall flow from her removal."[167]

Similarly, in *Dennis v. INS*,[168] the INS deported Dennis without providing the court with advance notice as promised.[169] However, the District Court of Connecticut had not actually issued a stay of deportation, so Dennis's deportation was not technically unlawful, as it was in *Singh* and *Fong*. The court, pursuant to its inherent powers "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases," granted Dennis's motion for a court order directing the INS to return him to the United States.[170] Discussing a number of ways in which Dennis's deportation significantly limited his ability to obtain meaningful assistance of counsel, the court granted his petition based on federal courts' general ability "to promote efficiency in their courtrooms and to achieve justice in their results."[171]

In contrast, the Fifth Circuit upheld habeas jurisdiction but found it had no power to grant the requested reentry remedy in *Zalawadia v. Ashcroft*.[172] Zalawadia's original Fifth Circuit appeal had been dismissed, but the Supreme Court granted his petition for certiorari and then vacated and remanded in light of *INS v. St. Cyr*.[173] In the meantime, Zalawadia was deported and sought habeas review from abroad.[174] However, the government urged that his deportation deprived him of the ability to request habeas relief.[175]

Under a theory that habeas review narrowly addresses the detention at issue, the Fifth Circuit concluded that the only relief it could

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164 317 F. Supp. 2d 398 (S.D.N.Y. 2004).

165 *Id.* at 402.

166 *Id.* at 406. The government's argument was that the court lacked jurisdiction over the habeas petition altogether because Fong had not exhausted her administrative remedies as required. *Id.*

167 *Id.* at 408.

168 No. CIV.A. 301CV279SRU, 2002 WL 295100, at *1 (D. Conn. Feb. 19, 2002).

169 *Id.*

170 *Id.* at *3 (citing Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991)).

171 *Id.* (citing Eash v. Riggins Trucking Inc., 757 F.2d 557, 564 (3d Cir. 1985)).

172 371 F.3d 292 (5th Cir. 2004).

173 *Id.* at 296 (citing INS v. St. Cyr, 533 U.S. 289 (2001)).

174 *Id.* at 295–96.

175 *Id.* at 296.

grant would be to vacate the underlying deportation order.[176] The court addressed neither Zalawadia's request for an order remanding his claim to the BIA, nor his request to be readmitted for the purpose of attending such a hearing.[177] However, Judge Jolly did cite the plenary power doctrine, including a footnote flagging that the court's "authority to order Zalawadia to be readmitted into the country is not only constrained by the nature of habeas review" and that "this case also concerns subject matter in which courts are most reluctant to involve themselves."[178] Thus, the Fifth Circuit saw Zalawadia's request to enter the United States as implicating the immigration framework.[179] Even the dissenting judge, who argued that the court had the power to remand to the district court with orders that they then remand to the BIA, conceded that the court's "arsenal of equitable remedies does not contain the 'big stick' of the threat of granting outright release (or, in this situation, its analogue, forced readmission)."[180]

Examining these cases, we see that judges confronting claims of deported individuals have granted relief where deportation was unlawful or inappropriate, but they are hesitant to interfere with the executive prerogative where the reason for reentry is not unlawful deportation itself but an intervening change in the law as in *Zalawadia*.[181] Thus, these cases establish two points. First, federal

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176 *Id.* at 301 ("[V]acating the deportation order is the beginning and end of the habeas authority we have . . . .").

177 *Id.*

178 *Id.* at 301 n.9.

179 Many individuals were deported under the 1996 laws before *St. Cyr* established that those laws would not necessarily have retroactive effect. INS v. St. Cyr, 533 U.S. 289, 326 (2001). The Court may have been concerned with the consequences of establishing a general right to return for noncitizens deported under an interpretation of the law which was later overturned. For further discussion of the implications of *St. Cyr* for those who had already been deported, see Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135, 137 (2002).

180 *Zalawadia*, 371 F.3d at 306 (Wiener, J., dissenting).

181 One could argue that the precedential effect of these cases should be limited because they involve deported individuals who had effected entry; thus, these individuals are generally entitled to more protections. *See supra* note 45 and accompanying text (discussing creation of "reentry" myth to cure inequity of depriving people with longstanding ties to the United States of any meaningful process). This may be true, but two responses counsel against ignoring these cases completely on that basis. First, there is some sense that deportation can break the ties that one had, thus placing the habeas petitioner outside of the sphere of protection given to those who had entered. *Cf.* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (holding that individuals found removable, *but not yet deported*, still had procedural protections guaranteed to those territorially present in the United States). Second, *Wang* and *Clark* both involved parole determinations of individuals who had been admitted to the United States in the past. As the "reentry" myth illustrates, this might echo the traditionally greater protections granted to individuals who have resided in the United

courts do not feel as constrained by deference to parole determinations as they do by deference to admissions determinations. This suggests that the plenary power framework only applies in its fullest form to the latter. Second, the unifying theme in cases in which parole was ordered is the presence of executive misconduct creating an injury that could not be entirely ameliorated without parole.

III
Toward a Coherent Framework

A. Parole as a Separation-of-Powers Tool

As described in Part I.B, the parole power is related to immigration but should not be considered part of the "admissions" scheme. The precedent discussed in Part II.B supports this conclusion, demonstrating that the judiciary does not conceive of the parole power as unreviewable in the way it treats other substantive admissions determinations. This underscores the importance of the utter confusion of the judges and litigants in Part II.A regarding the nature of the remedy requested.

The facts in the cases discussed above demonstrate that courts grant the parole remedy[182] when there has been executive misconduct. The court in *Wang I* was explicitly critical of the prosecution's conduct regarding both Wang's original parole into the United States and later attempts to deport him.[183] In *Walters v. Reno*, Judge Reinhardt upheld the parole of individuals whose procedural due process rights had been violated by INS policy.[184] Immigration officials removed Singh and Fong despite their judicial stays of deportation.[185] The Assistant

States as compared to those who are appearing for the first time at the borders. *See supra* note 45 and accompanying text.

[182] In *Walters v. Reno*, the court granted the parole power explicitly. 145 F.3d 1032, 1051 (9th Cir. 1998) (upholding provision of injunctive relief requiring the government to parole certain class members into the United States). In *Wang I*, the court's injunctive relief forbade the government from revoking Wang's parole status or removing him. *Wang I*, 837 F. Supp. 1506, 1563–64 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808 (9th Cir. 1996). In *Singh*, *Fong*, and *Dennis*, the courts claimed to be ordering the individual's "return." However, because they were not ordering their admission, they were de facto ordering parole. Singh v. Waters, 87 F.3d 346, 350 (9th Cir. 1996) (issuing writ directing the INS to "permit Singh to return to the United States"); Ying Fong v. Ashcroft, 317 F. Supp. 2d 398, 408 (S.D.N.Y. 2004) (ordering that Fong be "returned to the United States"); Dennis v. INS, No. CIV.A. 301CV279SRU, 2002 WL 295100, at *4 (D. Conn. Feb. 19, 2002) (directing the INS to "return" Dennis to the United States immediately).

[183] *See Wang I*, 837 F. Supp. at 1550–59 (discussing nine ways in which the government's actions shocked the conscience of the court).

[184] *See supra* note 154 and accompanying text.

[185] *See supra* note 161 and accompanying text (discussing *Singh*); *supra* note 165 and accompanying text (discussing *Fong*).

United States Attorney failed to keep his promise to the court to notify it before Dennis was deported.[186] In comparison, Zalawadia was not a victim of executive malfeasance. His deportation was based on a then-lawful but later overturned interpretation of the law.[187]

This pattern suggests two conclusions. First, as discussed above, it supports the idea that the parole power is not encompassed in the admissions power or subject to the plenary power doctrine. Second, the judiciary does not interfere with parole determinations lightly. Rather, the cases display a hesitation reflecting an acknowledgment that, traditionally, parole has been entrusted to executive discretion. Regardless of the immigration plenary power framework, courts have hesitated to interfere in such areas of administrative power. Thus, courts are hesitant to grant parole, not because of the plenary power doctrine, but because of broader separation-of-powers concerns.[188] However, such concerns can be overridden if there is a greater separation-of-powers problem—when the scope of the issue is individual injustice, as well as systemic imbalance. If we conceive of the judiciary's choices in this fashion, the parole power becomes an important separation-of-powers tool in the judiciary's arsenal.

This position reflects a broader understanding of how courts should function as remedial bodies. Richard Fallon and Daniel Meltzer have identified two separate judicial functions: "The first is to redress individual violations. . . . The second . . . [is] to reinforce structural values, including those underlying the separation of powers and the rule of law."[189] The courts' protection of individuals seeking relief from structural unfairness in the immigration laws, and from the malfeasance of government officials, suggests that the second function reinforces and invigorates the first. The exceptional circumstances required in *Singh* to justify intruding in an area where the courts typically defer to the Executive identify that the remedy in question is more than a simple compensation for wrongdoing. Rather, it suggests that the gravity of the Executive's misconduct demands a meaningful

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186 *Dennis*, 2002 WL 295100, at *2 (noting that petitioner was deported "despite the representation of the U.S. Attorney's Office that it would provide advance notice to permit the court to consider the merits of the petition before deportation occurred").

187 *See supra* note 173 and accompanying text (discussing *Zalawadia*).

188 The lack of any explicit congressional authority to grant parole is another reason to caution restraint by the federal judiciary on these issues. The federal judges discussed in Part II.B have crafted parole remedies under their general equitable powers, but one can question how this equitable power interacts with the statute. This question is beyond the scope of this Note, but the use of parole in the very limited situations I have discussed does not raise the same concerns as a nebulous habeas court power to order parole.

189 Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1787 (1991).

check—even if the only check available requires wading into an area courts typically avoid.[190]

Thus, once we assume parole should be evaluated under traditional separation-of-powers principles, we can recognize that the question presented is one of competing separation-of-powers prerogatives.[191] On the one hand, the judiciary should be hesitant to interfere with the parole power because it has been specifically delegated to the Executive. In addition, the parole power can affect foreign relations, another area where courts are particularly likely to defer to the Executive.[192] Courts generally seem to acknowledge this reasonable hesitation to interfere in executive discretion, while at the same time recognizing that the need for an appropriate check on potentially unlimited and arbitrary administrative power might be stronger than the need to defer.

B. Considerations Regarding Judicial Remedial Parole and the Uighurs

The line of cases discussed above suggests a recognition by the judiciary that parole, a traditionally executive function, can be ordered as a remedy for executive misconduct. The next question, then, is what this line of cases illuminates about the indefinite detention of the Uighurs at Guantánamo Bay. Since I have not addressed the important antecedent questions of jurisdiction, potential authority for detention, the elements of constitutional habeas relief, or the merits of the Uighurs' constitutional claims,[193] this Note does not

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[190] An interesting analogy can be made to instances when the judiciary chooses to abandon the political question doctrine (a separation-of-powers framework that works much like the plenary power doctrine to insulate political branch decisions from judicial review) and reach the merits based on other separation-of-powers concerns. *See* Weisselberg, *supra* note 34, at 1011 ("The political question doctrine serves as a mechanism to enforce the separation of powers."). The courts have reached the merits even in cases regarding foreign policy, traditionally insulated for reasons similar to the justifications behind the plenary power. *See, e.g.*, Japan Whaling Ass'n v. Cetacean Soc'y, 478 U.S. 221, 229 (1986) (rejecting the argument that the federal court lacked judicial power to review a case involving foreign relations).

[191] I use the term "traditional" to distinguish the separation-of-powers inquiry engaged in by the courts on these issues from the framework imposed by the "plenary power" doctrine, where the political branches are allowed to make decisions without any meaningful judicial check. Rather, the "traditional" doctrine of separation of powers encompasses an idea of meaningful checks and balances. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 472 (1974) ("The separation of powers was designed to provide . . . for checks and balances.").

[192] *See supra* note 190.

[193] *See* Slocum, *supra* note 56, at 1035–39 (2007) (arguing that courts should recognize that inadmissible aliens at Guantánamo Bay have constitutional rights against indefinite detention, or, in the alternative, reject or revise the entry fiction).

argue that remedial parole should or should not be granted. Instead, this Section identifies various considerations that suggest that the parole remedy might be desirable and addresses arguments that might be brought against the judicial remedy of parole.[194]

Critics have cautioned that the habeas court should allow the political branches significant discretion in shaping the details of the parole remedy if granted.[195] Some precedent suggests that the judiciary can order open-ended relief. For example, the injunction upheld in *Walters v. Reno* provided that "the INS must parole the alien or make other arrangements to allow the alien to attend" a hearing,[196] leaving the political branches "the option of establishing other procedures to achieve the same result."[197] This fails to recognize, however, one of the great strengths of parole as a remedy: its flexibility.

Under the parole framework, the government could set terms and conditions on the Uighurs' parole, but the court would maintain authority to determine if those conditions impinged on their order of release.[198] This flexibility regarding parole also could reflect the express wishes of the United States to avoid permanent responsibility for the Uighurs; they can remain in the United States until the government can resettle them in an appropriate location. The *Wang* cases are illustrative. Although Wang was permanently protected against removal to China, the Executive maintained full flexibility to arrange for his removal to a third country. The flexibility inherent in any grant of parole, as well as the continuing ability of the judiciary to supervise

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[194] Before *Boumediene v. Bush*, Ulysses S. Smith reviewed an earlier analysis of the Uighur petitioners' claims, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005), and suggested that "in the absence of a diplomatic solution, a federal court should order the Uighurs' indefinite detentions unlawful." Ulysses S. Smith, Note, *"More Ours than Theirs": The Uighurs, Indefinite Detention, and the Constitution*, 40 CORNELL INT'L L.J. 265, 302 (2007). The goal would be to "force the government's hand . . . which would in turn require the government to resolve the issue in a manner within its power." *Id.* at 300. However, the determination that there is no legal basis to detain the Uighurs has not forced the government to grant parole as suggested by Smith. *Id.* In addition, as flagged above, the Supreme Court has interpreted the *Munaf* determination to greatly limit judicial review of executive transfer negotiations post–habeas proceedings. *See supra* note 35.

[195] Roberts, *supra* note 25, at 29 ("The judiciary would be wise, however, to leave the details of implementation to the political branches.").

[196] Walters v. Reno, 145 F.3d 1032, 1051 n.14 (9th Cir. 1998).

[197] *Id.* at 1051.

[198] *See Wang III*, 930 F. Supp. 1377, 1379 (N.D. Cal. 1996) ("Such confinement would not, of course, comply with the Ninth Circuit's direction that Wang be *released*. The Court of Appeals has allowed this Court to place conditions on Wang's release, but those conditions cannot be so restrictive that they deprive Wang of his freedom to the same extent as being in the custody of the United States Marshals Service."); *id.* at 1380 ("The Court has the power and, indeed, the *duty* to protect Wang from such 'unlawful and unauthorized administrative power.'" (quoting Lester v. Parker, 235 F.2d 787, 790 (9th Cir. 1956) (per curiam))).

the strictures the Executive places on an individual, provide a prudential reason why parole might best balance the varying separation-of-powers concerns at issue.[199] Thus, parole as relief from indefinite detention would not necessarily be the final disposition regarding the Uighurs. Rather, parole would provide relief for detention without lawful imprimatur (the proper concern of the habeas court) while continuing to allow the Executive to negotiate for their removal abroad.

Another argument against relying on the cases discussed above is that these cases provide redress for immigration-related executive misconduct. One could argue that any egregious misconduct affecting the Uighurs does not bear an appropriately close nexus to immigration issues. For example, the forcible removal of the Uighurs from Asia and their long confinement in Guantánamo Bay may have been, at various times, unlawful, unreasonable, and immoral. However, the *Kiyemba* majority noted that, despite "all they have endured at the hands of the United States," the writ of habeas corpus "has never been compensatory in nature."[200] Perhaps the executive misconduct alleged to trigger the need for a parole remedy must be tied in some meaningful way to the challenged detention. Under this theory, the government could argue that it is enough that there was no executive misconduct regarding immigration or parole proceedings at all. Indeed, the *Kiyemba* majority found it meaningful that the Uighurs had not officially applied for admission.[201]

Two responses can address these arguments. First, the Executive itself uses parole in situations unrelated to admission.[202] Second, the Executive, by continuing to detain the Uighurs at Guantánamo Bay

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[199] In addition, the courts' ability to supervise the terms and conditions of parole is a major reason why the Uighurs should not allow their request to be construed as a plea for admission. Even assuming they could overcome the plenary power bar and persuade a court to grant them such admission, that grant would put the terms and conditions of their presence in the United States within the unreviewable control of the Executive, and, more importantly, subject to specific congressional statutes that might make them deportable. 8 U.S.C. § 1227(a)(1)(A) (2006) (making an individual deportable for being inadmissible at time of entry under § 212(a)(3)(B) of the Immigration and Nationality Act); *id.* § 1227(a)(4)(B) (triggering deportation of a noncitizen engaged in terrorist activities or associated with terrorist organizations). This would entitle the United States to detain them before, during, and after their removal proceedings, and for a period of time afterwards. *Id.* § 1226a (allowing the Attorney General to certify noncitizens as terrorist aliens and then keep them in custody during and after removal proceedings).

[200] Kiyemba v. Obama, 555 F.3d 1022, 1028–29 (D.C. Cir. 2009).

[201] *Id.* at 1029 n.14 (noting that the court does not know the immigration status of petitioners because they have not applied for admission).

[202] *See supra* notes 93–95 and accompanying text (discussing significant public benefit parole); *supra* notes 139–41 and accompanying text (discussing the government's use of parole to bring a witness into the country).

when there is concededly no legal basis on which to detain them, commits an ongoing act of misconduct. The Executive is failing to respect the requirement set forth in *Boumediene* that guarantees petitioners some form of "conditional release" if there is no basis for their detention.[203] The language of *Boumediene* also forcefully points out that habeas challenges are an essential separation-of-powers check on the Executive.[204] Here, not only has the Executive failed to suggest a release remedy (other than detention pending diplomatic negotiations); it has also failed to engage in any meaningful discussion of whether a safe parole remedy could be constructed.

In *Clark* and *Zadvydas*, the Executive was forced to parole individuals who were concededly inadmissible or deportable into the United States, and who were convicted of serious crimes that raised security concerns.[205] The Uighurs have not been convicted of any crimes, and there are no extant allegations of terrorist activity against them. Thus, while the original executive error involved in transporting them across the world and detaining them for years without charges may not have a close enough nexus to their requested relief, their continued detention in the face of the Executive's lack of legal basis may justify judicial intervention.

One last concern might be that the separation-of-powers analysis above does not take into account recent developments that demonstrate that *two* branches, rather than only one, oppose the release of the Uighurs into the United States. In the wake of *Boumediene* and the remedial question it left open, Congress has passed several prohibitions forbidding the use of federal funds "to release in the United States or . . . to transfer into the United States any person detained at Guantánamo Bay."[206] The concerted and vehement congressional stance against parole might be a factor that could affect a

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[203] Boumediene v. Bush, 553 U.S. 723, 779 (2008).

[204] *Id.* at 765 ("The writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."); *id.* at 797 ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.").

[205] Zadvydas had "a long criminal record, involving drug crimes, attempted robbery, attempted burglary, and theft." Zadvydas v. Davis, 533 U.S. 678, 684 (2001). Petitioners in *Clark* had been convicted of assault with a deadly weapon, burglary, grand theft, attempted oral copulation by force, armed burglary of a conveyance, armed burglary of a structure, and aggravated battery, among other convictions. Clark v. Martinez, 543 U.S. 371, 374–75 (2005). The courts have also addressed this type of situation since *Zadvydas* and *Clark*. *See, e.g.*, Tran v. Mukasey, 515 F.3d 478, 485 (5th Cir. 2008) (finding public safety concerns alone cannot justify continued detention); Nadarajah v. Gonzales, 443 F.3d 1069, 1082–84 (9th Cir. 2006) (releasing a noncitizen facing prolonged detention despite national security argument).

[206] Brief for the Respondents in Opposition, *supra* note 159, at 23 (citing such laws).

court's separation-of-powers analysis. However, *Boumediene* provides good evidence that the Supreme Court will not necessarily feel bound by the political branches' concerted action if it feels that a constitutional violation has been committed.[207]

CONCLUSION

The *Kiyemba* case illustrates the great confusion among the lower courts in light of *Boumediene*'s failure to clarify the scope of relief available to unlawfully detained individuals. This Note attempts to apply principles of immigration law to establish that the Uighurs should explicitly seek "parole" into the United States for two reasons. First, the judiciary can engage with the parole power more easily and appropriately than it can interfere with the admission power. Second, the nature of the parole remedy suggests that it would be the most just resolution: The judiciary can supervise the terms and conditions under which the Uighurs are paroled into the country to make sure they are granted meaningful release, and the Executive can continue to negotiate for their removal abroad, thus avoiding permanent responsibility for individual Uighurs.

While there are valid counterarguments to the expansive use of this precedent to justify judicial interference in parole, the cases demonstrate that courts are appropriately viewing this particular remedy through a separation-of-powers framework. While the appropriate balance in this case and in future cases is beyond the scope of this Note, I suggest that the executive misconduct in question here—the continuing detention of the Uighurs without legal basis and without meaningful attempts to create remedies other than through diplomacy—might justify judicial intervention. In the end, the Uighurs' request for relief requires an extremely complex, delicate balancing of branch interests and responsibilities. However, both courts and litigants will be better served if the question is approached within a coherent framework.

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[207] Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 453 (2010) (noting that *Boumediene* is the first case in Supreme Court history overturning "concerted action of both Congress and the President during wartime"). In addition, Benjamin Wittes has suggested that the congressional restrictions on executive spending for purposes of resettlement "taunt" the Supreme Court into taking a case similar to *Kiyemba*, doubting that "it will hold that no court has any power to order someone brought to the United States to be released *when that person has been ordered freed by a habeas* [court] *and when Congress has specifically disallowed the executive branch to spend money negotiating his freedom anywhere else*." Benjamin Wittes, *House GOP to Supreme Court: Bring Gitmo Detainees Here*, LAWFARE (Feb. 23, 2011), http://www.lawfareblog.com/2011/02/a-house-gop-gift-to-habeas-litigants/.