Department of Justice

STATEMENT

OF

JONATHAN COHN
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

AND THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY
AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

STRENGTHENING IMMIGRATION ENFORCEMENT

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Thank you Chairman Cornyn, Chairman Kyl, and members of the subcommittees for allowing me to address two significant flaws in our Nation's immigration laws. One of these flaws permits criminal aliens to delay their removal by seeking superfluous levels of judicial review that are generally unavailable to non-criminal aliens. And the other requires the government to release violent criminal aliens into the American public irrespective of the dangers they pose to the community. Both of these flaws can be fixed legislatively, and we respectfully urge Congress to enact the much-needed reforms.

I. INTRODUCTION

In 1996, Congress took action to protect the American people by enacting the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, Title III-A, 110 Stat. 3009-546 (Sept. 30, 1996) ("IIRIRA"). At the time, this legislation appeared to be sufficient to satisfy Congress's interest in expediting the removal of criminal aliens and expanding the government's authority to detain such aliens. But

in a series of decisions beginning in 2001, the Supreme Court held that Congress did not speak clearly enough. As a result, there are two holes in our country's immigration laws, which call out for a swift congressional response.

First, criminal aliens have the right to seek superfluous levels of judicial review that are generally unavailable to non-criminal aliens. Although Congress attempted to streamline judicial review for criminal aliens in 1996, the Court interpreted Congress's reforms as permitting such aliens to challenge their removal orders through habeas petitions in district court. *See* in *INS v. St. Cyr*, 533 U.S. 289 (2001). The result is that violent criminal aliens generally receive *more* layers of judicial review than they had before and *more* review than non-criminal aliens receive. Criminal aliens are thus able to stay in the United States for *longer* periods of time.

Second, the government is required to release numerous rapists, child molesters, murderers, and other dangerous illegal aliens onto our streets. In 1996, Congress removed the six-month limit on the detention of deportable aliens who present a danger to the community or national security. *See* Immigration and Nationality Act ("INA") § 241(a)(6); 8 U.S.C. § 1231(a)(6); *see also* 8 U.S.C. § 1252(c), (d) (1994). In *Zadvydas v. Davis*, however, the Supreme Court presumed that this six-month period still remained in effect, and in *Clark v. Suarez-Martinez,* the Court made clear that the limit generally applies to all aliens, even those who were stopped at the border and never admitted. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Suarez-Martinez*, 125 S. Ct. 716 (2005). Consequently, vicious criminal aliens are now being set free within the United States.

Because these decisions were based on statutory, not constitutional, grounds, Congress has the power to fix the resulting problems. Indeed, the Supreme Court has already invited it to

do so, and the solutions are readily available. Section 105 of H.R. 418, which has been passed by the House, would eliminate the duplicative judicial review that criminal aliens currently enjoy. Additionally, Congress has already established procedures governing the detention of particular aliens who endanger our national security – procedures that include hearings, judicial review, and opportunities for aliens to periodically challenge their detention. By extending these procedures to other dangerous aliens, Congress can ensure fair treatment while protecting the American people.

II. THE *ST. CYR* FIX: ELIMINATING DUPLICATIVE AND BURDENSOME LITIGATION BY DANGEROUS CRIMINAL ALIENS

A. Historical Background and the Supreme Court's Decision in *INS v. St. Cyr*

Since 1961, Congress has consistently provided that only the courts of appeals may review removal orders. From 1961 through 1996, the Immigration and Nationality Act ("INA") provided that review in the courts of appeals "shall be the sole and exclusive procedure" for judicial review of deportation orders. *See* INA § 106(a), 8 U.S.C. § 1105a(a) (1994) (entitled "Exclusiveness of procedure"). As the legislative history behind this provision reveals, Congress aimed to "create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." H.R. REP. NO. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2950, 2966 (1961). Congress's "fundamental purpose" was "to abbreviate the process of judicial review of deportation orders" and to "eliminat[e] the previous initial step in obtaining judicial review -- a suit in a District Court." *Foti v. INS*, 375 U.S. 217, 224 (1963); *accord Agosto v. INS*, 436 U.S. 748, 752-53 (1978);

Giova v. Rosenberg, 379 U.S. 18 (1964) (per curiam). Thus, a final order of deportation could be challenged only in the appropriate court of appeals upon a timely filed petition for review.

The order could not be challenged in district court by way of habeas corpus. Although the INA contained another provision permitting habeas review, *see* INA § 106(a)(10); 8 U.S.C. § 1105a(a)(10) (1994), several Circuits interpreted that provision as *not* providing habeas review over deportation orders, but only review over collateral issues, such as whether the alien should be released from custody or granted a stay of deportation pending a petition for review.[1/] These courts correctly reasoned that the "sole and exclusive" procedure that Congress set forth was indeed sole and exclusive.

[1/] *See Turkhan v. INS*, 123 F.3d 487, 488 (7th Cir. 1997) ("Although § 106(a)(10) authorized district courts to hear habeas petitions regarding certain BIA actions, *see Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir.1985), § 106(a) made the federal courts of appeals the exclusive place for judicial review of final orders of deportation."); *Garay v. Slattery*, 23 F.3d 744, 745 (2d Cir. 1994) ("there was no jurisdiction in the district court to consider an appeal from a final order of deportation"); *Daneshvar v. Chauvin*, 644 F.2d 1248, 1250-51 (8th Cir. 1981). Moreover, although other Circuits permitted habeas review of certain deportation orders when the alien was in custody, such review was limited. *See Nakaranurack v. United States*, 68 F.3d 290, 294 (9th Cir. 1995); *Marcello v. District Director*, 634 F.2d 964, 968 (5th Cir.) ("a mere failure to appeal at all within the six-month period provided would raise immediate questions of deliberate bypass of statutory remedies, and . . . habeas relief would likely be held unavailable . . . ."), *cert. denied*, 452 U.S. 917 (1981); *see also Galaviz-Medina v. Wooten*, 27 F.3d 487, 491-92 (10th Cir. 1994) (habeas review under INA § 106(a)(10) is limited to constitutional or other claims traditionally cognizable under habeas). As the Ninth Circuit held, habeas review was not to be an option when direct review in the courts of appeals was available. *Nakaranurack, supra* (finding that generally habeas jurisdiction is not available to review issues that could have been raised in a petition for review; allowing habeas review in district court where alien could not seek judicial review in court of appeals because he did not receive timely notice of agency's decision); *Singh v. INS*, 825 F. Supp. 143, 145 (S.D. Tex. 1993) ("To permit petitioners to knowingly bypass the statutorily afforded methods of judicial review would introduce an added level of review, and hence delay, and thereby undermine the efficiency and expediency Congress sought to achieve.").

Moreover, to the extent that habeas review of deportation orders had been available before 1996, Congress attempted to eliminate it in enacting AEDPA. One of the statute's provisions, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," expressly repealed the old habeas provision. See § 401(e), 110 Stat. 1268, repealing INA § 106(a)(10) (1995), 8 U.S.C.

§ 1105a(a)(10) (1994). This was part of Congress's broad efforts to streamline immigration proceedings. Indeed, to expedite removal, section 440(a) of AEDPA precluded *all* judicial review of deportation orders for certain classes of criminal aliens. 110 Stat. 1276-77 (providing that such orders "shall not be subject to review by any court").

Congress continued these streamlining reforms when it enacted IIRIRA. In IIRIRA, Congress reestablished that only courts of appeals – and not district courts – can review a final removal order (or, to use the pre-1996 nomenclature, deportation order or exclusion order). *See* 8 U.S.C. § 1252(a)(1) (incorporating Hobbs Act, 28 U.S.C. § 2347). In addition, Congress made clear that review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding. 8 U.S.C. § 1252(b)(9) (2000); *see also* IIRIRA § 309(c)(4)(A) (transition rules). Together, these provisions were intended to preclude all district court review of any issue raised in a removal proceeding. Finally, as it did in AEDPA, Congress confirmed that criminal aliens cannot obtain *any* judicial review. IIRIRA expressly provided that, "[n]otwithstanding any other provision of law, *no* court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including aggravated felonies. *See* 8 U.S.C. § 1252(a)(2)(C) (2000) (emphasis added);

see also S. Rep. No. 104-249, 104th Cong, 2d Sess. at 7 ("Aliens who violate U.S. immigration law should be removed from this country as soon as possible.").

Nonetheless, despite Congress's efforts to limit judicial review, the Supreme Court expanded it just five years later. In *St. Cyr*, the Supreme Court held that criminal aliens – whom Congress decided should have *no* judicial review – are actually entitled to *more* review than they had before, and more review than non-criminal aliens. *St. Cyr*, 533 U.S. 289 (2001). Specifically, the Court held that criminal aliens could seek habeas review of their removal orders under 28 U.S.C. § 2241. With habeas review, the criminal alien gets review in district court *and*, on appeal, in the court of appeals.

The basis for the Court's decision was that Congress never "explicitly mention[ed]" section 2241 or habeas when it eliminated all judicial review over criminal aliens' removal orders. *Id.* at 312-13. According to the Court, an explicit reference to section 2241 or habeas was necessary because Congress did not provide for "another judicial forum" for criminal aliens to raise pure questions of law. *Id.* at 298-300, 312-14; *see also id.* at 312 n.36 ("Congress' failure to refer specifically to § 2241 is particularly significant."). (As noted, whereas non-criminal aliens could challenge their removal orders in the courts of appeals, under AEDPA and IIRIRA, criminal aliens could not.) Thus, as a matter of statutory interpretation, the Court held that criminal aliens could bring habeas actions under section 2241.

The Court recognized that, as a result of its decision, criminal aliens would be able to seek review in district court and, on appeal, in the courts of appeals, whereas non-criminal aliens could obtain review *only* in the courts of appeals. But the Court noted that Congress could fix

this anomaly. As the Court stated, "Congress could without raising any constitutional questions, provide an adequate substitute [to section 2241] through the courts of appeals." *Id.* at 314. n.38.

B. Consequences of *St. Cyr*

1. Delay in the Removal of Criminal Aliens

Among the many problems caused by *St. Cyr*, the most significant is that criminal aliens can now delay their expulsion from the United States for years. Contrary to Congress's intent that criminal aliens be given no judicial review of their removal orders, criminal aliens are afforded *two* levels of judicial review, in addition to the multiple levels of review they receive before the administrative agency. The beneficiaries of this delay include child molesters like Oswaldo Calderon-Terrazas, who was convicted of two counts of sexual abuse for drugging and then raping a 15-year old girl. Calderon-Terrazas was ordered deported in June of 2002, but was able to stretch out judicial review in the federal courts over the next two years by filing a habeas action in district court and an appeal to the Fifth Circuit Court of Appeals. *See Calderon-Terrazas v. Ashcroft*, 117 Fed. Appx. 903, 2004 WL 2476500 (5th Cir. 2004); *Pequeno-Martinez v. Trominski*, 281 F. Supp.2d 902, 914-15 (S.D. Tex. 2003). As both courts found, his case lacked merit, but he was able to stay in the country longer simply because he was convicted of raping a child, and thus had access to habeas review.

St. Cyr has also allowed convicted murderers like Lennox Thom, Luis Rey Garcia, and George Padmore to extend their stay in the United States. After being convicted and after receiving full immigration proceedings before an immigration judge and the Board of Immigration Appeals, each alien was granted two more hearings before a district court and a court of appeals to decide his habeas petition. *See Thom v. Ashcroft*, 369 F.3d 158 (2d Cir.

2004); *Garcia v. Fasano*, 62 Fed. Appx. 816, 2003 WL 21054722 (9th Cir. 2003); *Padmore v. Reno*, 81 Fed. Appx. 745, 2003 WL 22429056 (2d Cir. 2003). Had they not murdered people, they would have received less review of their meritless immigration claims.

Moreover, the Supreme Court's decision in *St. Cyr* also creates an opportunity for delay because it eviscerates Congress's 30-day time limit for judicial review of removal orders found in 8 U.S.C. § 1252(b)(1) (2000). There is no analogous time limitation in habeas corpus. Thus, a criminal alien can entirely ignore his removal order, fail to report for removal, and years later, when the Department of Homeland Security finds and detains him (at the taxpayers' expense), file a last-minute habeas action seeking a stay of removal and review of his immigration order. Clearly, this loophole undermines the finality of immigration proceedings. Indeed, the House Report that accompanied the 1961 immigration legislation warned of precisely this type of danger. It stated that permitting aliens to raise all challenges to deportation orders for the first time after being taken into INS custody would invite "the sorry spectacle of having deportable aliens wait until they are being led to the ship or plane, years after the deportation proceedings have been concluded, before they deign to seek legal redress in the courts." H.R. REP. NO. 1086, at 30, reprinted in 1961 U.S.C.C.A.N. 2950, 2974. Yet, that is exactly the state of affairs under *St. Cyr*.

2. Illogical and Unfair Result

Furthermore, because of *St. Cyr*, aliens who have committed serious crimes in the United States are generally able to obtain *more* judicial review than non-criminal aliens. As the dissent in *St. Cyr* pointed out, allowing criminal aliens to obtain habeas review of their immigration orders in the district court "brings forth a version of the statute that affords criminal aliens more

opportunities for delay-inducing judicial review than are afforded to non-criminal aliens, or even than were afforded to criminal aliens prior to the legislation concededly designed to *expedite* their removal." 533 U.S. at 327 (Scalia, J. dissenting). This is because, under *St. Cyr*, criminal aliens are able to begin the judicial review process in the district court, and then appeal to the circuit court of appeals. Criminal aliens thus can obtain review in two judicial forums, whereas non-criminal aliens may generally seek review only in the courts of appeals.[2/] Not only is this result unfair and illogical, but it also wastes scarce judicial and executive resources.

[2/] This point may not apply in the minority of circuits that have held that district courts have jurisdiction under section 2241 to review claims of non-criminals. *See Riley v. Greene*, 310 F.3d 1253 (10th Cir. 2002); *Liu v. INS*, 293 F.3d 36, 38-41 (2d Cir. 2002); *Chmakov v. Blackman*, 266 F.3d 210, 213-16 (3d Cir. 2001). But that only exacerbates the problem. Although the fairness issue may not be present in these circuits, it is certainly illogical to conclude that the immigration reforms were designed to give *all* aliens at least double the amount of judicial review they received prior to the reforms, and some aliens triple the review (review in the court of appeals, habeas in district court, and an appeal to the court of appeals).

For example, Oleg Kanivets was ordered deported by the Board on October 28, 2002. A non-criminal alien, Mr. Kanivets could have filed a petition for review with the Third Circuit Court of Appeals to seek review of the denial of his claim for asylum. However, he completely ignored the INA's judicial review requirements and filed a habeas action in district court. The district court found that it had habeas jurisdiction even though Mr. Kanivets filed a review petition directly with the Third Circuit raising other issues in the case. *Kanivets v. Riley*, 320 F. Supp.2d 297 (E.D. Pa. 2004). The Government has appealed the decision to the Third Circuit.

Unwilling to let non-criminal aliens circumvent the INA's judicial-review procedures, other circuits have required the filing of a petition for review in the court of appeals. *See Rivera-Martinez v. Ashcroft*, 389 F.3d 207, 210 (1st Cir. 2004); *Gomez-Chavez v. Ashcroft*, 308 F.3d 796, 800 (7th Cir. 2002); *Lopez v. Ashcroft*, 332 F.3d 507, 510 (8th Cir. 2003); *Castro-Cortez v. INS*, 239 F.3d 1037, 1046-47 (9th Cir. 2001). Indeed, even the Tenth Circuit has recognized this prudential exhaustion requirement, notwithstanding *Riley*. *See Tyson v. Jeffers*, 115 Fed. Appx. 34, 2004 WL 2492886, *3 (10th Cir. 2004), *petition for certiorari. filed* (Feb. 8, 2005) (No. 04-8606) (unpublished) ("Two recent cases from this court have pointed out that petitioners err when they file habeas petitions in district court without first filing for direct appellate review of removal orders in the courts of appeals."); *id.* at *4 ("This exhaustion requirement, and the procedural default rule accompanying it, are motivated by the same general principles that support the procedural default rule applied to § 2255 petitions.").

3. Confusion, Piecemeal Judicial Review, and Burden on Government Resources

Finally, the result in *St. Cyr* has created confusion in the federal courts as to what immigration issues can be reviewed, and which courts can review them. The decision in *St. Cyr* itself held that district courts, and not the courts of appeals, have habeas corpus review authority over statutory claims involving discretionary immigration relief. *See also Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001). On the other hand, after *St. Cyr,* every circuit court has held that courts of appeals retain jurisdiction to review limited threshold "jurisdiction to determine jurisdiction" questions raised by criminal aliens in petitions for review. Therefore, following *St. Cyr*, some issues are still reviewable in the circuit courts while others are reviewable only in the district courts, resulting in bifurcated and inefficient review. Additionally, the circuits have split on the question of which court may entertain constitutional challenges to criminal aliens' removal orders (a question left open in *St. Cyr*).[3/] All of this has resulted in piecemeal review,

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[3/] *Compare Balogun v. Ashcroft,* 270 F.3d 274, 278 n.11 (5th Cir. 2001) (observing that courts "retain jurisdiction to consider . . . substantial constitutional claims," even when the jurisdiction-stripping provisions of immigration law purport to deprive the courts of jurisdiction); *Robledo-Gonzalez v. Ashcroft*, 342 F.3d 667, 690 (7th Cir. 2003) ("[T]his court has continued to assert its jurisdiction to review substantial constitutional questions even after the Supreme Court's decision in *St. Cyr.*"); *Patel v. INS,* 334 F.3d 1259, 1263 (11th Cir. 2003) ("The parties before us agree, however, that under the case law of our court, § 1252(a)(2)(C) does not strip us of jurisdiction to hear and determine substantial constitutional issues.") (citing cases); *Vasquez-Velezmoro v. U.S. INS*, 281 F.3d 693, 696 (8th Cir. 2002) ("This Court has jurisdiction to consider substantial constitutional challenges to the Immigration and Nationality Act."), *with Kuhali v. Reno,* 266 F.3d 93, 101 (2d Cir. 2001) ("Finally, because we conclude in the discussion that follows that Kuhali's conviction falls under INA § 242(a)(2)(C), his habeas petition would still be proper with respect to his constitutional claims even if his other claims were defaulted . . . ."); *Olatunji v. Ashcroft*, 387 F.3d 383, 388 (4th Cir. 2004) ("In sum, the mandate of section 1252(a)(2)(C) that 'no court shall have jurisdiction to review any final order of removal' plainly extends to all claims on direct review, including constitutional claims."); *Adekoya v. Ashcroft*, 121 Fed. Appx. 593, 2005 WL 106799, *4 (6th Cir. 2005) (unpublished) ("To the extent that Adekoya wishes to challenge the district court's ruling that Section 212(c) relief was unavailable

uncertainty, lack of uniformity, and a waste of resources both for the judicial branch and Government lawyers – the very opposite of what Congress tried to accomplish in 1996.

Consider, for example, the Seventh Circuit's recent decision in *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004), in which the court dismissed the petition for review after determining that the aliens' controlled substance offenses deprived it of jurisdiction over their petitions. Lacking jurisdiction, the court transferred the cases to the district court under *St. Cyr* to resolve the merits of petitioners' statutory claims. *Id.* at 284. Both parties had extensively briefed the statutory question before the Seventh Circuit, and several government attorneys spent significant time working on the cases. Yet, over one year after oral argument, and almost two and half years after the cases had commenced, the Seventh Circuit transferred the petitions to the district court to start the process anew in habeas. These criminal aliens will now be able to remain in the United States for years as their cases wind through the district court and ultimately, *again,* to the Seventh Circuit.

The case of Luis Suarez further illustrates this problem. Mr. Suarez, an alien convicted of attempted car hijacking (an aggravated felony), filed a habeas corpus petition in March of 2001 arguing that he was a citizen. The district court dismissed the petition and Mr. Suarez filed

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to him on constitutional grounds or otherwise, the Supreme Court has been very clear that such a challenge must take place in a habeas proceeding rather than on direct review by federal courts of appeal."); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) ("However, we have already held that an appellate court does not retain jurisdiction to consider even substantial constitutional claims regarding removal orders covered by INA § 242(a)(2)(C)"); *Latu v. Ashcroft*, 375 F.3d 1012, 1018-19 (10th Cir. 2004) ("Thus, we disagree with the government's argument that Mr. Latu could have raised all the issues in his habeas corpus petition in a petition for direct review. We conclude that Mr. Latu properly filed a timely habeas petition to bring his constitutional claims that were not reviewable on direct review under § 1252(a)(2)(C).").

an appeal to the Fourth Circuit. Meanwhile, Mr. Suarez also filed a petition for review directly with the Fourth Circuit in July of 2002. In January of 2003, the Fourth Circuit dismissed Mr. Suarez's appeal of the district court's decision and in July 2003 dismissed the review petition. *Suarez v. Ashcroft*, 69 Fed. Appx. 184, 2003 WL 21546009 (4th Cir. 2003); *Suarez v. Rooney*, 53 Fed. Appx. 703, 2003 WL 40772 (4th Cir. 2003). This one alien's lawsuits required substantial resources both from the U.S. Attorney's Office and the Office of Immigration Litigation in the Department of Justice, as well as from the Fourth Circuit which had to consider two separate petitions, and the district court which adjudicated the habeas action. And all of this was *after* Mr. Suarez had received administrative review before an immigration judge and the Board of Immigration Appeals.

In 2004 alone, the government had to defend against almost 1,000 new habeas cases that could not have been filed if the circuit courts had remained the "sole and exclusive" forum for judicial review of removal orders, as Congress intended. The result is not better review – just more work for the overburdened courts and government attorneys struggling to keep pace with the recent surge in immigration litigation.

C. Congressional Reform – H.R. 418

Fortunately, the legislative fix is simple and has already been approved by the House. Section 105 of H.R. 418 would amend the INA to clarify that judicial review for final orders of removal is available solely in the courts of appeals and not by habeas corpus in the district courts. This bill does not eliminate judicial review, but simply restores such review to its former settled forum prior to 1996. Under the proposed statutory scheme, *all* aliens who are ordered removed by an immigration judge will be able to appeal to the Board of Immigration Appeals and then

raise constitutional and legal challenges in the courts of appeals. *No alien, not even criminal aliens, will be deprived of judicial review of such claims.* Unlike AEDPA and IIRIRA, which attempted to eliminate judicial review of criminal aliens' removal orders, the proposed bill would give every alien one day in an Article III court – the court of appeals. Accordingly, there should be no question at all as to the constitutionality of the proposed reforms. In supplanting the writ of habeas corpus with an alternative scheme, Congress need only provide a scheme which is an "adequate and effective" substitute for habeas corpus. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). Indeed, in *St. Cyr* itself, the Supreme Court recognized that "Congress could, without raising *any* constitutional questions, provide an adequate substitute through the courts of appeals." *St. Cyr*, 533 U.S. at 314 n.38 (emphasis added). By placing all review in the courts of appeals, the House bill would provide an "adequate and effective" alternative to habeas corpus. *Id.*[4/]

Moreover, these reforms address the problems created by *St. Cyr* by restoring uniformity and order to the law. First, criminal aliens will have fewer opportunities to delay their removal,

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[4/] The proposed reforms would preclude criminals from obtaining review over non-constitutional, non-legal claims. But this would effect no change in the scope of review that criminal aliens receive, because habeas review does not cover discretionary determinations or factual issues that do not implicate constitutional due process. *See, e.g., St. Cyr*, 533 U.S. at 306-07 & n.27 (recognizing that habeas courts do not review "exercise[s] of discretion" or "factual determinations" that do not implicate due process); *Fong Yue Ting v. INS*, 149 U.S. 698, 713-14 (1893) ("Congress might intrust the final determination of . . . facts to an executive officer"); *Heikkila v. Barber,* 345 U.S. 229, 236 (1953) ("the function of the courts has always been limited to the enforcement of due process requirements"); *Ter Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997) ("the Supreme Court long ago made it clear that this writ does not offer what our petitioners desire: review of discretionary decisions by the political branches of government"); *see also Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001) (habeas jurisdiction under § 2241 does not extend to factual or discretionary determinations). Moreover, the bill would not preclude habeas review over challenges to detention; the bill would eliminate habeas review only over challenges to a removal order.

because they will not be able to obtain district court review in addition to circuit court review, and they will not be able to ignore the thirty-day time limit on seeking review. Second, criminal aliens will not receive more judicial review than non-criminals. All aliens get review in the same forum – the courts of appeals. Third, by channeling review to the courts of appeals, the bill eliminates the problems of bifurcated and piecemeal litigation, which only serve to increase the burdens on courts and government attorneys. Thus, the overall effect of the proposed reforms is to give every alien a fair opportunity to obtain judicial review while restoring order and common sense to the judicial review process.

III. THE *ZADVYDAS /SUAREZ-MARTINEZ* FIX: PREVENTING THE RELEASE OF VIOLENT CRIMINAL ALIENS

A. Historical Background and the Supreme Court's Decisions Limiting the Detention of Aliens Ordered Removed

1. *Zadvydas v. Davis*

In 1996, Congress recognized that it is sometimes difficult for the Executive Branch to remove aliens who present a danger to the community. Accordingly, Congress eliminated the pre-existing six-month limit on the detention of deportable aliens who have been ordered removed. *See* INA § 241(a)(6), 8 U.S.C. §1231(a)(6). Just five years later, however, the Supreme Court held, as a matter of statutory construction, that the six-month limit still generally remained. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Zadvydas involved two dangerous aliens who were admitted into the United States but later ordered removed after being convicted of crimes: Kestutis Zadvydas, who had a "long criminal record [of] drug crimes, attempted robbery, attempted burglary, and theft," and Kim Ho Ma, who was convicted of manslaughter for his role in a gang-related shooting. *Id.* at 684-85.

Because of the danger they presented and their risk of flight, the government held them both in custody while trying to remove them. *Id.* at 684-86. The government made multiple attempts to find countries willing to accept these aliens, but received only refusals. *Id.* at 684, 686.

Before long, Zadvydas and Ma filed petitions for writs of habeas corpus, complaining that they had been detained for an impermissible period of time. *Id.* at 684-85, 686. Although they conceded that they were illegal aliens who were ordered removed, they asserted that they had a right to be released into the United States. *Id.* at 685, 686. In a 5-4 decision, the Supreme Court agreed on statutory grounds. Although the Court acknowledged that the INA included no time limit on detentions, and, if read literally, allowed the Attorney General to decide how long to detain an alien, *id.* at 689, 697, the Court inferred a time limit in the statute. According to the Court, even though Congress expressly eliminated the six-month restriction, the INA still implicitly limits the detention of criminal aliens ordered removed to six months. *Id.* at 689, 699. The Supreme Court reasoned that once an alien receives a final removal order, detention is permissible only so long as it is "reasonable." *Id.* at 699. In order to promote "uniform administration in the federal courts," the Court ruled that detention for six months is "presumptively reasonable." *Id.* at 701. After six months, if a criminal alien "provides good reason to believe that there is no significant likelihood" that he can be removed "in the reasonably foreseeable future," the government must either demonstrate that the alien is wrong or release him into the United States. *Id.*

Significantly, the Supreme Court did not address the constitutional questions the aliens presented. Indeed, the Court emphasized that its holding was based solely on its interpretation of

the INA, and left open the possibility that Congress could change the result by amending the INA. *See id.* at 697.

2. *Clark v. Suarez-Martinez*

Earlier this year, the Supreme Court extended the holding of *Zadvydas* in *Clark v. Suarez-Martinez,* 125 S. Ct. 716 (2005). *Suarez-Martinez*, like *Zadvydas*, involved two aliens who had filed habeas petitions challenging their detentions: Sergio Suarez-Martinez and Daniel Benitez. In contrast to the aliens in *Zadvydas*, however, Suarez-Martinez and Benitez were never admitted into the United States and they never had any right to be here. Instead, they were stopped at the border and determined to be excludable aliens. *Suarez-Martinez*, 125 S. Ct. at 720.

The government granted Suarez-Martinez and Benitez parole from detention, a privilege both aliens abused by committing a string of crimes. *Id.* at 720-21. While paroled, Suarez-Martinez was convicted of attempted oral copulation by force, two instances of assault with a deadly weapon, burglary, and petty theft with a prior conviction; and Benitez was convicted of grand theft, two counts of armed robbery, two counts of armed burglary, aggravated battery, carrying a concealed firearm, unlawful possession of a firearm while engaged in a criminal offense, and unlawful possession, sale, or delivery of a firearm with an altered serial number. *Id.* Accordingly, the government revoked their paroles and placed them in custody, which lasted for several months. *Id.* at 721.

The two aliens filed habeas petitions. *Id.* They argued that because they had been detained for over six months and it was not "reasonably foreseeable" that they could be removed, their continued detentions were unreasonable under *Zadvydas*. *Id.* In response, the government argued that the rule established in *Zadvydas*, which involved aliens who had been admitted into

the United States, did not apply to Suarez-Martinez and Benitez, who were stopped at the border, excluded, and never admitted to the United States. *Id.* at 725. The government noted the well-settled principle that excluded aliens are entitled to far fewer protections than aliens who have been admitted. *Id.* at 723, 726. Indeed, the Supreme Court had acknowledged this distinction in *Zadvydas*, stating that "[a]liens not yet admitted to this country would present a very different question." *Zadvydas*, 533 U.S. at 682.

But the *Suarez-Martinez* Court nevertheless rejected the government's construction and ruled that *Zadvydas*'s holding applied to excluded aliens, as well. *Suarez-Martinez*, 125 S. Ct. at 722. According to the Court, "it is not a plausible construction of [the INA] to imply a time limit as to one class [of aliens] but not to another." *Id.* at 723 (citation and internal quotation marks omitted). The Court explained that it would not apply different rules for different categories of aliens, and that all criminal aliens detained pursuant to INA § 241(a)(6) could challenge post-removal detentions lasting longer than six months.

The Court clarified, however, that it had not decided any constitutional questions, and that it based its holding solely on its interpretation of the INA. Indeed, the Court invited Congress to amend the INA to eliminate any threats to the community or "the security of the borders" that dangerous criminal aliens may present. *Id.* at 727 & n.8. The Court pointed to the statute governing aliens who present national security concerns as an example of one route Congress could take. *Id.* at 727 n.8 (citing 8 U.S.C. § 1226a).

B. Consequences of *Suarez-Martinez* and *Zadvydas*

1. Release of Hundreds of Excluded Criminal Aliens

As a result of *Suarez-Martinez,* hundreds of excluded aliens, who never had any legal right to enter the United States, are now being released into the country indefinitely. Among these aliens are hardened criminals from the 1980 Mariel boatlift, some of whom were sent directly from Cuban jails by the government of Cuba. It is well documented that many of these aliens engaged in serious criminal conduct after their arrival in this country, and that, with limited exceptions, Cuba has frustrated their repatriation. *See, e.g.*, 52 Fed. Reg. 48799 (Dec. 1987); *Palma v. Verdeyen,* 676 F.2d 100, 101-02 (4th Cir. 1982); *Matter of Barrera*, 19 I & N Dec. 837 (BIA 1989).

All Mariel Cubans who could not be repatriated were eventually paroled into communities, some two or more times. Parole was revoked, however, in numerous instances after the parolees were convicted and incarcerated for new crimes committed in the United States. By requiring the release of these dangerous criminal aliens, the Supreme Court's decision in *Suarez-Martinez* threatens the safety of the American people and displaces the historical, judicially approved use of the government's parole authority. *See, e.g., Gisbert v. Attorney General*, 988 F.2d 1437 (5th Cir. 1993); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir.) (*en banc*), *cert. denied*, 516 U.S. 976 (1995).

Indeed, at the time of the Supreme Court's decision, approximately 920 excluded criminal aliens were subject to release in accordance with the Court's ruling, including over 700 Mariel Cubans. By mid-February, roughly 150 of these aliens had been released in order to

comply with *Suarez-Martinez*. *See Freed Detainees Are Left Homeless*, MIAMI HERALD (Feb. 17, 2005). And many more have been released since or are due for release in the near future.

Among them are vicious criminals who have murdered their wives, molested young children, and brutally attacked their enemies. One such alien is Antonio Valenti-Cordova, who has had an extensive history of mental illness, a conviction for second-degree murder, and a delusional notion that the FBI instructed him to strangle his wife because she was a communist. Another is Angel Mayo-Boffil, a schizophrenic sex offender who has been deemed an "extreme violator" despite earlier treatment in a sex offender program. Other examples include Carlos Rojas-Fritze, who sodomized, raped, beat, and robbed a stranger in a public restroom and called it an "act of love"; Guillermo Perez-Aquillar, who repeatedly committed sexual crimes against children and was arrested for possession of a controlled substance; Elio Riveron-Aguilera, who committed aggravated criminal sexual assault, rape with a gun, robbery, kidnaping, and possession of controlled substances while on parole; and Roberto Barz-Tellez, who was arrested 14 times in the United States and was convicted of burglary, drug, and firearm offenses before his immigration parole was revoked in 2002.

Similarly, the United States is now required to release Francisco Guilarte-Felipe, a violent alien who has admitted to being imprisoned in Cuba for eight months for "disfiguring" another during an argument. He has been in some form of custody since 1983, when he was sentenced to 8 to 16 years for first degree manslaughter after he shot his wife, whom "voices" told him to kill. While in detention, Guilarte-Felipe has been involved in 14 disciplinary incidents between 1995-2001 (most of which involved assault). The government has also begun processing Lourdes Gallo-Labrada for release, even though she has a frightening criminal record. In 1984, she was

convicted for attempted first degree murder and arson after she literally set her boyfriend on fire. And in 1992, she was convicted again for assault. All told, since entering immigration custody in 1991, she has received 64 disciplinary reports, the majority of which were for assault.

2. Release of Deportable Criminal Aliens

The Supreme Court's decisions will also likely result in the release of several vicious criminal aliens who at one time had a right to be here but no longer do. Before *Suarez-Martinez*, the government thought it could detain at least some of these aliens. Indeed, in *Zadvydas*, the Court recognized that a case may present "special circumstances" warranting continued detention. The Court suggested that such special circumstances could include cases involving aliens who have terrorist ties or are especially dangerous. This led the Department of Justice to conclude that the Court would interpret the INA differently in these cases. 66 Fed. Reg. 56, 968. Accordingly, the Department issued regulations designed to permit the continued detention of aliens who are mentally ill and especially dangerous, who present national security or terrorism concerns, whose release would compromise the Nation's foreign policy, or who carry a highly contagious disease. 8 C.F.R. § 241.14(b), (c), (d), (f). Specifically, the regulations established procedures and substantive standards for detaining aliens who fall into one of these categories. The regulations were narrowly drawn to allow continued detention only when the risk to the public is particularly strong and only when no conditions of release can avoid such risk.

Unfortunately, in light of *Suarez-Martinez*, the dangerous aliens that are subject to these regulations will argue that they are invalid.. As discussed, under the logic of *Suarez-Martinez*, one "cannot justify giving the *same* detention provision a different meaning" simply because a different class of aliens is involved. *Id.* at 724. As the Supreme Court explained, "it is not a

plausible construction of [the INA] to imply a time limit as to one class [of aliens] but not to another." *Id.* at 723. Consequently, some courts may conclude that the government is barred from considering *any* individual characteristics when deciding whether to release an alien, even strong signs that the alien is physically dangerous. *All* aliens would be subject to the six-month limit on detention. Thus, although the Department will continue to defend the regulations in court, they will be subject to challenge.

In fact, even before *Suarez-Martinez*, one court struck down the government's regulation on detaining aliens who are mentally ill and dangerous. In *Thai v. Ashcroft*, the Ninth Circuit Court of Appeals ordered the release of a mentally deranged rapist who vowed that he would repeat his crimes if released. *Thai v. Ashcroft*, 366 F.3d 790, 798-99 (9th Cir. 2004). According to the court, even when an illegal alien ordered removed is mentally ill and violent, the government must release the alien after six months unless it can show that another country will accept him in the near future. *Id.* at 798.

Tuan Thai's crimes speak for themselves. Thai was convicted of third degree assault for a vicious battery on his girlfriend. *Thai v. Ashcroft*, 389 F.3d 967, 971 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc). "He knocked her down and punched her 10 to 20 times. He pushed a chair down on her and choked her with both hands, then bound her up with a cable around her wrists and ankles. He also stuffed a microphone into her mouth and turned up the radio," *id.*, and threatened to beat her slowly until she died. Later, Thai was convicted of third-degree rape. "While his friend was out fishing in Alaska, he raped his friend's girlfriend repeatedly over the course of several months, beginning while she was six months pregnant. He monitored her phone calls with her boyfriend, threatened to put cocaine in her

vagina and harm her other children if she tried to kick him out, and threatened to kill her more times than she could remember." *Id.* Far from showing remorse, Thai "called his rape victim from jail and threatened to find her and burn her house down when he got out"; "threatened her with 'payback'" at a court hearing for a protective order; "became abusive to his interpreter, whom he almost hit, as well as to an officer and an immigration judge" at his reasonable cause hearing; "threatened to kill his [immigration] judge and prosecutor after he was released"; and vowed that "once he is released, 'even the judge could not do anything to him.'" *Id.* at 971-72. While in custody, Thai refused to participate in treatment programs for sex offenders. Two psychiatrists concluded that Thai was mentally ill and predicted that Thai "will repeat his actions if released." *Id.* at 971.

Not surprisingly, the United States was unable to remove Thai without creating an international incident. *Thai v. Ashcroft*, 366 F.3d 790, 792 (9th Cir. 2004). Thus, the only two options were to continue to detain him or to release him into the United States, where he promised he would commit more crimes. Recognizing that no conditions of release would adequately prevent such crimes, the government argued that Thai should be kept in detention. But the Ninth Circuit disregarded Thai's promises that he would repeat his grisly acts and held that it was irrelevant that Thai was clearly dangerousness and mentally ill. *Id.* at 798. According to the Ninth Circuit, it did not matter how dangerous he was, how many women he would rape, or what other unspeakable crimes he would commit. The court ordered Thai released. *Id.* at 798-99; *id.* at 799 & n.6.

Unfortunately, Tuan Thai is not an isolated case. As Judge Kozinski noted in his dissent from the court's decision to deny rehearing en banc, there are at least four other dangerous,

mentally ill deportable aliens detained in the Ninth Circuit alone. These "include[ ] a pedophile who was sentenced to over 13 years in prison for continuous sexual assault of a minor under age 14 and for a lewd act on a child under age 15; a pedophile convicted of sexual abuse of a 12-year old girl and sexual contact with an 8-year old girl; a schizoaffective/bi-polar arsonist who set fire to an occupied building and who has convictions for simple assault, aggravated assault, and criminal possession of a weapon; and a murderer who was diagnosed as a malingerer (faking mental illness) and with antisocial personality disorder." *Thai*, 389 F.3d at 972 & n.4 (Kozinski, J., dissenting from denial of rehearing en banc). In fact, one of the pedophiles violated his parole only two weeks after the district court granted his habeas petition. *Id.* Without a legislative fix, even more pedophiles, serial rapists, and psychopaths could be released into the American public.

Moreover, considering these criminals' prior records, the chances of future offenses are substantial. As one of IIRIRA's sponsors stressed, "[r]ecidivism rates for criminal aliens are high." 142 Cong. Rec. 7972 (1996). Indeed, according to a GAO study, "77 percent of noncitizens convicted of felonies are arrested at least one more time." *Id.*; *see also Demore v. Kim*, 538 U.S. 510, 518-19 (2003) (noting evidence before Congress of high rates of recidivism, including that 45% of deportable criminal aliens were arrested multiple times); GAO, Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved 7 (July 15, 1997) (in one study, 23% of released aliens had been rearrested for crimes, including 184 felonies). Congress can help prevent these crimes by enacting a legislative fix to *Zadvydas* and *Suarez-Martinez*.

3. Release of Aliens Who Pose National Security Threats

Furthermore, under the logic of *Suarez-Martinez*, aliens will also argue that the government is limited in its ability to detain terrorists and other aliens who present a national security threat. If, in fact, the government's detention regulations are invalid, the only authority for detaining such aliens would be another statute. Currently, there are two statutory provisions on which the government may rely: 8 U.S.C. § 1537 and 8 U.S.C. § 1226a. Neither is sufficient. Accordingly, without a legislative fix, the United States may not be able to detain aliens who present national security threats.

Section 1537 is limited in three significant ways. First, the section applies only to aliens who have gained admission into the United States and does not cover arriving aliens. INA § 501, 8 U.S.C. § 1531. Second, the statute covers only those aliens who have actually engaged in terrorist activity and does not apply to aliens who have other connections to terrorist activities or who pose other national security risks, such as espionage. INA §§ 501, 237(a)(4)(b), 8 U.S.C. §§ 1531, 1227(a)(4)(B). Third, section 1537 applies only if the alien is placed in proceedings before the Alien Terrorist Removal Court (ATRC), as opposed to conventional proceedings before an immigration judge. This has never been done before. An alien can be placed in ATRC proceedings only if there is probable cause to believe that removal under conventional proceedings "would pose a risk to the national security of the United States." INA § 503(a)(1)(D), 8 U.S.C. § 1533(a)(1)(D). Ordinarily, placing terrorists in conventional removal proceedings does not present a risk to national security. If, for example, the terrorist overstayed his visa, he can be ordered removed through conventional proceedings based solely on the visa violation. Consequently, the ATRC might not be available, and the government might lack

authority under section 1537 to detain the alien, even though the terrorist's home country might eventually refuse repatriation and create a national security concern. Alternatively, the government might choose not to initiate ATRC proceedings even when they are available. Because of the difficulties in proving that an alien has engaged in terrorist activities and because of the sensitivities in using classified information, the government may, at times, simply find it more expedient to remove an individual based on conventional factors than to attempt to prove his status as a terrorist in ATRC proceedings. If the alien ultimately cannot be physically removed from the United States, the United States might have no choice but to release the terrorist back into the American public.

Section 1226a is likewise inadequate. First, the statute does not expressly authorize post-order detention. Second, an alien could argue that detention is impermissible unless the Attorney General certifies that the alien is a danger before the alien is taken into custody, 8 U.S.C. § 1226a(a)(1), and before removal proceedings begin, 8 U.S.C. § 1226a(a)(5). Third, one could contend that classified information may not be used in these proceedings. Although the Department does not find these arguments convincing, there is no reason to run the risk that a court might be persuaded. When an alien is a terrorist or presents other national security concerns, the statute should eliminate any doubt that the government is equipped to protect the American people.

4. Release Of Aliens In Violation of United States Foreign Policy

Furthermore, even if an alien does not pose a danger to the community or security of the United States, the government may have serious foreign policy reasons for keeping that alien in custody until he can be removed. Recognizing this, the Department of Justice's regulations allow

the government to detain an alien if the Secretary of State determines that the alien's release would cause "serious adverse foreign policy consequences," even if detention lasts over six months and removal is not reasonably foreseeable. 8 C.F.R. § 241.14(c). Due to the confusion wrought by the Supreme Court's decisions in *Zadvydas* and *Suarez-Martinez*, however, the government has been required to defend against challenges to this basic, Executive power.

Abdi Alinur Mohamed provides a case in point. Mohamed, or Judge Nur, is a native of Somalia, where he committed numerous acts of political persecution, war crimes, and human rights atrocities. From 1987 to 1988, Judge Nur served as Chief Judge of the Military Court, a "slaughterhouse" in which citizens who spoke out against the Barre dictatorship were tried and convicted in single-day, sham trials. Many of Judge Nur's victims were executed the same day as their trial, some within an hour of his verdict. Judge Nur imposed these death sentences as part of a program to exterminate members of the political opposition, many of whom were members of the Isaaq clan. His victims were buried in mass graves. As explained by one witness, whose father was among thirteen prisoners tried in Mohamed's military court and executed by a firing squad that same day: Judge Nur was "the Hitler of Northern Somalia." "Judge Nur did to the Somali people what Hitler did to the Jews. . . . He did everything possible to eliminate a[] whole ethnic group." Statement of Somali witness.

The United States made three attempts to remove Judge Nur, but to no avail, and he filed a habeas petition, asserting that he was entitled to be released under *Zadvydas*. The government argued that the regulations permitted Judge Nur's continued detention, because Judge Nur's release would have serious adverse foreign policy consequences. 8 C.F.R. § 241.14(c). As then-Secretary of State Powell explained, releasing Judge Nur could lead other countries and

perpetrators of human rights abuses to "conclude that the United States is not serious about taking aggressive steps to bar human rights violators from residing freely in the United States," a result that would undercut the United States' "central" foreign policy objective of promoting "human rights, the rule of law, and holding answerable those who have committed serious human rights abuses, genocide, war crimes or crimes against humanity." Secretary of State Colin Powell, Letter to Secretary of Homeland Security Thomas J. Ridge, at 4 (April 24, 2004). Secretary Powell additionally concluded that releasing Judge Nur would contradict U.S. efforts to promote "peace, good governance, and stability" and to "re-establish functional judicial services" in Somalia. *Id.* at 5. Lastly, Secretary Powell found that releasing Judge Nur into the United States would be inconsistent with the United States government's Somali-refugee-resettlement program, which requires Somalis to undergo time-consuming security clearances and excludes Somalis who have committed crimes. *Id.* Judge Nur countered that, after *Zadvydas*, the regulations were not valid.

The court never decided Judge Nur's claim. Just days before the scheduled hearing on Judge Nur's habeas petition, the United States was able to remove Judge Nur to a third country, and his petition was dismissed as moot. Nonetheless, this case demonstrates why clear detention authority is necessary. It is not always possible to remove an alien to a third country. Next time, the United States might be required to release the human rights abuser into the American public.

5. Encouraging Illegal Immigration

Finally, the Supreme Court's decisions in *Zadvydas* and *Suarez-Martinez* may encourage illegal immigration. In the past, aliens knew that if they entered the United States, they could be caught and detained. Now, these aliens might speculate that, once they arrive in the United

States, they will not be removed (because the United States will be unable to remove them) and if caught, they will eventually be released into the country (under the six-month rule of *Zadvydas* and *Suarez-Martinez*). Additionally, hostile countries may have a greater incentive to encourage illegal immigration and even to send criminals to the United States. "[B]y refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community." *Zadvydas*, 533 U.S. 678, 711 (Kennedy, J., dissenting).

Cuba provides a case in point. Fidel Castro has used his own people as "bargaining chips" in his efforts to pressure the United States to modify its policies. Human Rights Watch/Americas, *Cuba: Repression, the Exodus of August 1994, and the U.S. Response* 2 (Oct. 1994). In 1965, Castro sent 5000 migrants to the United States, on the assumption that "the appearance of loss of control over U.S. borders – coupled with the perception inside the U.S. that Florida might be overrun – would be viewed by U.S. leaders as politically costlier than the alternative of dealing with him." Kelly M. Greenhill, *Engineered Migration As a Coercive Instrument: The 1994 Cuban Balseros Crisis* 13 (Feb. 2002). In 1980, Castro expressed his anger over United States immigration policies toward Cubans, United States government statements labeling Cuba a Soviet puppet state, and the Peruvian and Costa Rican governments' handling of 10,000 asylum seekers, by flooding the United States with more than 100,000 migrants. Wayne S. Smith, *The Closest of Enemies: A Personal and Diplomatic Account of U.S.-Cuban Relations Since 1957*, at 200-10 (1987). This included thousands of criminals whom Castro forced onto the departing boats. 52 Fed. Reg. 48,799. In 1994, Castro again released tens of thousands of Cubans in an attempt to pressure the United States to lift its economic embargo, alter its immigration policies, and engage in bilateral talks with Cuba. Greenhill, *supra*, at 17-25.

And in April 1995, Castro threatened yet another boatlift in an effort to derail the proposed Helms-Burton legislation, *see* 22 U.S.C. §§ 6021-6091.

To be sure, most of the aliens that Castro sent to the United States are law-abiding and productive members of society. Moreover, the United States should remain faithful to its immigrant heritage and continue serve as a haven for those in need. But this interest in compassion must be balanced with our interest in national security. And for dictators like Castro, the knowledge that any criminals they send will eventually be freed into the United States only increases the power of illegal immigration as a bargaining tool. It is all too easy to imagine that other countries, or Al Qaeda cells, will follow Castro's lead and help criminals and terrorists enter the United States.

Lastly, the Supreme Court's decision in *Suarez-Martinez* may encourage migrants to undertake treacherous voyages to the United States in ramshackle boats. Prior to *Suarez-Martinez*, these aliens faced the possibility of long-term detention. But now that they are guaranteed eventual freedom into the United States, they have an added incentive to attempt the dangerous trip. Even worse, the United States may now have a strong incentive not to help migrants in trouble on the high seas reach United States soil – for when they do, we will be limited in our ability to detain them, even if they turn out to be criminals or national security threats. Thus, *Suarez-Martinez* could adversely affect this country's ability to manage migration crises from Cuba, Haiti, or any number of countries.

C. Congressional Reform

Congress has the power to solve this problem. Indeed, the Supreme Court has invited it to do so, stating that if the "Government fears that the security of our borders will be

compromised . . . Congress can attend to it." *Suarez-Martinez*, 125 S. Ct. at 727. Additionally, a solution is readily available. As noted, Congress has already established procedures governing the detention of certain aliens who present national security concerns. INA § 236A, 8 U.S.C. § 1226a. These procedures provide ample due process protections, including hearings, periodic review, recurring opportunities for the alien to submit evidence, and judicial review in the federal courts. Indeed, the Supreme Court specifically pointed to these procedures as one way Congress could change the result in *Suarez-Martinez*. *Suarez-Martinez*, 125 S. Ct. at 727 & n.8. Congress should accept the Supreme Court's invitation and extend these procedures (minus the infirmities discussed above) to other illegal aliens who present an unwarranted danger to the community, our national security, or our foreign policy. Such a solution will ensure fair treatment of illegal aliens while protecting our Nation's immigration interests.

IV. ADDITIONAL REFORMS

Although eliminating *St. Cyr* habeas review and granting the government the authority to detain dangerous criminal aliens will significantly improve the immigration system, other reforms are needed to expedite removal proceedings and reduce burdensome and unproductive litigation of immigration cases. For instance, Congress can clarify the authority for reinstatement orders. Despite the provisions authorizing the government to reinstate removal orders against aliens who unlawfully re-enter the United States, one court has concluded that illegal aliens who violate their removal orders and sneak back into the country are entitled to yet another round of full proceedings before an immigration judge. *E.g.*, *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004). To reduce duplicative litigation and delay, Congress should clarify that reinstatement orders do not require immigration court proceedings.