Dissecting In re D-J-: The Attorney General, Unchecked Power, and the New National Security Threat Posed by Haitian Asylum Seekers

Judy Amorosa

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cilj/vol38/iss1/8
Dissecting In Re D-J-: The Attorney General, Unchecked Power, and the New National Security Threat Posed by Haitian Asylum Seekers

Judy Amorosa†

Introduction .................................................... 264

I. Background .............................................. 266
   A. Plenary Power and Exclusion ......................... 266
   B. National Security Justification Historically ...... 267
   C. U.S. Treatment of Haitian Immigrants .............. 269
   D. Obligations to Asylum Seekers Under U.S. and International Law .......... 270

II. The Attorney General's Decision in D-J- ............. 271
   A. The Holding ......................................... 271
   B. The Facts ............................................ 271
   C. Application of U.S. Law .............................. 272
      1. De Novo Review of Fact and Law .................. 272
      2. Broad Discretion and Lack of Judicial Review .. 273
      3. National Security Grounds ......................... 274
      4. Due Process Rights of Inadmissible Aliens ........ 274
   D. Application of International Law ..................... 275

III. Analysis .................................................. 276
   A. Application of U.S. Law .............................. 276
      1. Foreclosing Judicial Review ....................... 276
         a) Unchecked Administrative Power ............... 276
         b) Plenary Power and Due Process Rights of Inadmissible Persons .......... 277
         c) Availability of Habeas Relief ................. 283
      2. Decided Wrongly on the Merits .................... 284
         a) Lacks a Reasonable Foundation ................. 284
         b) Contrary to Statutory Construction .......... 288
   B. Application of International Law ..................... 289

Conclusion ...................................................... 292

† B.A., University of Notre Dame, 1999; Candidate for joint J.D.-LL.M. in International and Comparative Law, Cornell Law School, 2005. I would like to thank Professor Stephen Yale-Loehr for his outstanding immigration law seminar where this Note originated; Professors Trevor Morrison, and Estelle McKee for their invaluable comments; the ILJ editors for their excellent work; and my mother for her perspective on refugee issues.

38 Cornell Int'l L.J. 263 (2005)
Introduction

Since September 11, 2001, Congress has toughened U.S. immigration policy in an effort to combat the perceived terrorist threat posed by noncitizens on U.S. soil.1 While Congress has passed immigration legislation specifically targeting terrorists and suspected terrorists,2 and immigration authorities have dutifully enforced this legislation,3 civil libertarians have decried the effects of these measures on Arab and Muslim American communities and on detained persons of Arab or Muslim descent.4 While Arab and Muslim communities have reason to protest, a recent precedential ruling of Attorney General John Ashcroft, In re D-J-5 demonstrates that the government has cast its net in its fight against terrorism well beyond these communities.6

The target population of the post-September 11th immigration-related security measures involved in D-J- is, perhaps unsurprisingly, a historically disfavored immigrant group: undocumented Haitians arriving by sea, many of whom claim asylum.7 Citing "national security" considerations,

7. See generally Jean v. Nelson, 472 U.S. 846 (1985) (stating that Article 33 of the United Nations Protocol Convention relating to the status of refugees did not apply to Haitians apprehended before they had landed on U.S. soil, because the Protocol was "not intended to govern parties' conduct outside their borders"); Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (determining that the Haitian Refugee Center lacked standing to challenge the U.S. government's program of interdicting on the high seas undocumented Haitians trying to reach the United States); Pierre v. United States, 547 F.2d 1281 (2d Cir. 1977) (holding that the United Nations Protocol did not grant aliens due process rights under the U.S. Constitution and the distinction between excludable aliens and aliens who have made entry does not deny excludable aliens—here, Haitians apprehended on open waters—equal protection). See also Donald Kerwin, Counterterrorism and Immigrant Rights Two Years Later, 80 INTERPRETER RELEASES 1401, 1403 (2003) ("Haitian boat people, long the object of disparate treatment by the U.S., have also been miscast as a security threat."); Wendy Young, Director of Government Relations, Women's Commission for Refugee Women and Children, Presentation to Church World Service Conference on Haitian Refugees (Feb. 5, 2003), at http://www.womenscommission.org/archive/03/statements/haiti.html (last visited Nov. 22,
the Attorney General ("AG") determined in D-J- that release on bond of a Haitian asylum seeker, David Joseph, and similarly situated persons was unwarranted.8

This paper explores the path the AG took to classify Haitian asylum seekers as a threat to national security and the resultant detention without bond for such persons awaiting a decision on removal. In challenging the AG's decision in D-J-, I dissect the two-step combination that led to the AG's unilateral, unchecked decision to deprive noncriminal, undocumented asylum seekers of their liberty while awaiting determination of their immigration status. First, I address the Attorney General's complete casting aside of the contrary determinations, of both fact and law, of the Immigration Judge ("IJ") and of the Board of Immigration Appeals ("BIA") by asserting fully de novo review.9 Second, I explore the asserted nonreviewable nature of the Attorney General's decision by focusing on § 236(e) of the Immigration and Nationality Act ("INA") and habeas corpus relief for detained noncitizens. I conclude that the Attorney General's decision to deprive noncriminal aliens of their freedom from government-imposed restraint based on generalized national security concerns, rather than an individualized determination, constitutes a deprivation of due process that should be subject to judicial review in all cases.

Part I of this Note discusses pertinent background to the D-J- decision, including the plenary power doctrine, use of a national security justification in immigration matters historically, past U.S. treatment of Haitian asylum seekers, and obligations to asylum seekers found under U.S. and international law. Part II examines the Attorney General's decision in D-J-, including his application of fully de novo review and exercise of broad discretion without judicial review, and his use of a national security justification and its implication of the due process rights of inadmissible aliens. Part II concludes with the AG's summary dismissal of applicable international law. Part III analyzes flaws in the AG's opinion in D-J- by relying on principles of administrative law and judicial review and by arguing that plenary power is incompatible with due process. After demonstrating that habeas corpus remains available to inadmissible persons such as David Joseph, Part III argues that the AG decided D-J- wrongly on the merits, in that his decision both lacks a "reasonable foundation" and is contrary to principles of statutory construction. Part III also covers the AG's problem-

2004) [hereinafter Young, Women's Commission for Refugee Women and Children Presentation]

Clearly, the message the U.S. government wishes to send is 'Haitians not welcome.' ... But first I should say that a desire to keep Haitians out ... is nothing new. Those who lived through the Haitian crisis of the early to mid 90s are only too familiar with the dynamics. ... Finally, reflecting the times in which we find ourselves, the U.S. government has come up with a new argument to support the restrictions it has applied to Haitians. It has characterized Haitians as a threat to our national security.

Id; D-J-, 23 I. & N. Dec. at 580 (noting "[t]he persistent history of mass migration from Haiti, in the face of concerted statutory and regulatory measures to curtail it").
9. Id. at 575.
atic dismissal of relevant international law. Finally, this Note concludes that the AG's decision in *D-J* represents an unreasonable exercise of unchecked power—using "national security" as a pretext to deter an undesirable immigrant group—that should be subject to judicial review in all cases.

I. Background

A. Plenary Power & Exclusion

Since the *Chinese Exclusion Case*\(^\text{10}\) of 1889, a "plenary power doctrine" has developed that gives the political branches "sole and full authority over the legal regime governing immigration" and extraordinary judicial deference to their actions in the area.\(^\text{11}\) Congress's plenary power to exclude and to admit aliens found its bases in sovereignty itself and other "incidents" of sovereignty, including the federal power to conduct foreign relations and the war power.\(^\text{12}\)

The traditional distinction between the power to deport and the power to exclude has coincided with the measure of constitutional protection the Court has granted these classes of persons: "Deportable" persons, i.e., those lawfully admitted to the United States and later ordered removed, have been afforded a greater degree of rights than "excludable" persons, i.e., those not lawfully admitted although sometimes present in the United States nonetheless.\(^\text{13}\) In 1996, Congress collapsed the longstanding distinction between deportable and excludable or inadmissible aliens into a single category of removable persons.\(^\text{14}\) However, in a recent decision, the Court noted the continuing importance of the distinction.\(^\text{15}\)

---

\(^{10}\) Chae Chan Ping v. United States [the Chinese Exclusion Case], 130 U.S. 581 (1889).

\(^{11}\) See Charles Gordon *et al.*, *Immigration Law and Procedure* § 9.03 (2003); see also *Chinese Exclusion Case*, 130 U.S. at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.").

\(^{12}\) See Gordon *et al.*, *supra* note 11, § 9.03.

\(^{13}\) See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *Yale L.J.* 545, 550–60 (1990). Noncitizens present in the United States who have not been lawfully admitted are termed "inadmissible" (formerly "excludable") and are subject to removal under the Immigration and Nationality Act § 212, 8 U.S.C. § 1182(a) (1952). Noncitizens who have been lawfully admitted may be subject to removal (on various grounds) through deportation. *Id.* § 237. The 1996 legislation also replaced the term "entry," which covered both legal and illegal passage into the country, with the concept of "admission," i.e., inspection and authorized entry by an immigration official. See Motomura, *supra* at 557; *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA) § 301, 8 U.S.C. § 1229 (1996). The 1996 changes tried to do away with the so-called "entry fiction." Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 *Geo. Immigr. L.J.* 611, 631 n.98 (2003). Under the "entry fiction," inadmissible noncitizens present in the United States were deemed stopped at the border for constitutional purposes. *Id.* This justified giving inadmissible or excludable noncitizens fewer constitutional rights than deportable noncitizens. *Id.*

\(^{14}\) See IIRIRA § 304(a); Miller, *supra* note 13, at 631 n.98.

Shortly after the *Chinese Exclusion Case*, the Court used the plenary power doctrine to immunize executive officers from judicial review of their discretionary decisions over excludable immigrants.\(^{16}\) In that case, the Court held that where Congress had expressly entrusted the final determination of facts to an executive officer, the officer’s statutorily conferred discretionary power was
to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.\(^{17}\)

In 1950, the Court reaffirmed the plenary power of the political branches to determine the procedures due to excludable noncitizens: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”\(^{18}\)

B. National Security Justification Historically

Historically the government has used its exclusion power to bar the entry of classes of persons it deemed a threat to security.\(^{19}\) The classification of inadmissible persons has coincided with perceived threats to U.S. security based on domestic and global developments.\(^{20}\) In the early part of the twentieth century, with apprehension about the possible spread of Bolshevism at the close of World War I, Congress enacted the Anarchist Act of 1918\(^ {21}\) to exclude and deport aliens based on affiliation or membership in organizations advocating the forcible overthrow of the U.S. government.\(^ {22}\) With the U.S. entrance into World War II on the horizon, Congress enacted

\[\text{16. Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (affirming, however, the right of detained noncitizens to seek habeas corpus: “An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful”). Excludable refers to “foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law.” Id. Petitioner, a Japanese national, was intercepted and detained when the steamship she was traveling on arrived at the port of San Francisco. Id.}
\]

\[\text{17. Id.}
\]

\]

\[\text{In the particular circumstances of the instant case the Attorney General, exercising the discretion entrusted to him by Congress and the President, concluded upon the basis of confidential information that the public interest required that petitioner [the German wife of a naturalized citizen] be denied the privilege of entry into the United States. He denied her a hearing on the matter because, in his judgment, the disclosure of the information on which he based that opinion would itself endanger the public security.}
\]

\[\text{Id.}
\]

\[\text{19. See Gordon et al., supra note 11, § 63.04[2].}
\]

\[\text{20. See id.}
\]

\]

\[\text{22. See Gordon et al., supra note 11, § 71.06.}
\]
the Alien Registration Act of 1940\textsuperscript{23} to deal with Communists and members of other subversive groups.\textsuperscript{24} In the Cold War period, Congress enacted the 1950 Internal Security Act\textsuperscript{25} that banned the entrance of current or past members of the Communist Party.\textsuperscript{26} Congress responded to the fall of communism in the Soviet Union and Eastern Europe by significantly easing restrictions on the admissibility of members or affiliates of the Communist Party.\textsuperscript{27} In the 1990s, Congress shifted its focus from Communists to terrorists, against whom analogous exclusion measures have been directed.\textsuperscript{28}

Currently the Immigration and Nationality Act’s security related grounds for exclusion apply to any alien who seeks to engage in or who has engaged in any of the following activities: espionage, sabotage, violation of certain export laws, “other unlawful activity,” activities to overthrow the government by force or unlawful means, terrorist activities or association with terrorist organizations, activities having potentially serious adverse foreign policy consequences, membership or affiliation with “the Communist or any other totalitarian party” (with exceptions), and Nazi persecution or genocide.\textsuperscript{29}

In the deportation context, the Court has deferred to Congress’s power to expel “aliens whose presence in the country it deems hurtful.”\textsuperscript{30} Historically, the Court has allowed Congress to expel even longtime U.S. residents that it found undesirable, including Communists,\textsuperscript{31} convicted

\begin{itemize}
  \item \textsuperscript{23} Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 670 (1940), amended by ch. 783, 62 Stat. 1206 (1948).
  \item \textsuperscript{24} See Gordon et al., supra note 11, § 71.06.
  \item \textsuperscript{26} See Gordon et al., supra note 11, § 63.04[2].
  \item \textsuperscript{27} Id. § 63.04[3][b][iii][C][iv][d].
    Increased terrorism in the United States in the mid-1990[s], some allegedly conducted by noncitizens, prompted Congress to enact measures to make terrorists more easily inadmissible and removable. As one congressional report noted at the time, “[t]he removal of alien terrorists from the U.S., and the prevention of alien terrorists from entering the U.S. in the first place, present among the most intractable problems of immigration enforcement.”
  \item \textsuperscript{29} See id.
  \item \textsuperscript{30} See Carlson v. Landon, 342 U.S. 524, 536 & n.25 (1952) (citing cases in which “[Congress] was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society”).
  \item \textsuperscript{31} See, e.g., Carlson, 342 U.S. at 524 (holding that Congress has the power to expel a Communist from the United States); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding Congress’s right to expel former Communists who were longtime U.S. residents).
\end{itemize}
criminals, and aliens convicted of crimes against national security. The Court has also noted that the Attorney General's authority to detain is a necessary part of his power to deport. It has, however, understood the Attorney General's authority to detain without bail as a necessary power to be used in order to avoid giving aliens the opportunity "to hurt the United States during the pendency of deportation proceedings." The Court has expressly stated that "[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion [to detain without bail] was placed . . . in the Attorney General . . . ."

C. U.S. Treatment of Haitian Immigrants

Many commentators have recounted the extensive efforts of the U.S. government to keep Haitians out of the United States. The gravamen of this story is that U.S. government policy towards Haitian asylum seekers has been interminably restrictive and even cruel.

In 1981, the United States began a unique program of interdicting fleeing Haitians on the high seas and forcibly repatriating them after summary shipboard screenings. In the early 1990s, before the U.S. Naval Base at Guantanamo Bay became home to a new breed of U.S. enemy, the United States interned on Guantanamo thousands of interdicted Haitians, many of them HIV-positive, without due process of any kind. Then presidential candidate Bill Clinton called this anti-Haitian policy of the first Bush Administration "appalling" but then later endorsed it as his own once he took office.

Haitians who made it past the Coast Guard to reach U.S. shores did not fare much better. In 1981, with no new statutory or regulatory authority, the Attorney General ordered detention without parole of arriving immigrants who could not present a prima facie case for admission. In Jean v. Nelson, a majority of the Court refused to rule on Haitian asylum seekers' claim that the Immigration and Naturalization Service's ("INS")

32. See, e.g., Mahler v. Eby, 264 U.S. 32 (1924) (holding that Congress has the power to expel a convicted criminal from the United States).
33. See, e.g., United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950) (holding that Congress has the power to expel from the United States aliens convicted of crimes against national security).
34. See Carlson, 342 U.S. at 538.
35. Id.
36. Id.
39. Id. at 2394-97.
40. Id. at 2396-97, 2397 n.29.
detention regime under the AG's order violated the Equal Protection Clause of the Fifth Amendment on race and national origin grounds.42

D. Obligations to Asylum Seekers Under U.S. and International Law

The United Nations Convention Relating to the Status of Refugees is the primary source of international law governing states' obligations to and treatment of asylum seekers.43 Although the United States is not a signatory to the Convention, it ratified the 1967 Protocol Relating to the Status of Refugees.44 By ratifying the 1967 Protocol, the United States bound itself to obligations contained in Articles 2 through 34 of the Convention.45

The Sixth Circuit has held that the Protocol is not self-executing and therefore requires Congressional enactment to make its provisions judicially enforceable in the United States.46 The Second Circuit has similarly held that because the treaty is not self-executing, all the protections that are due to asylum seekers are contained exclusively in federal immigration statutes.47 Consequently, one could conclude that the provisions of the Convention are irrelevant as a basis for asylum seekers to assert rights in U.S. courts.

However, the Supreme Court has stated that Congress intended the 1980 Refugee Act to bring U.S. refugee law into conformance with the 1967 Protocol.48 Moreover, the Vienna Convention on the Law of Treaties49 supports the proposition that the United States does have obligations to asylum seekers that are derived from international law.50 Article 26 (Pacta sunt servanda) of the Vienna Convention provides that "[e]very

42. Id. at 854-55.
47. Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982).
treaty in force is binding upon the parties to it and must be performed by them in good faith.\textsuperscript{51} Article 27 further states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."\textsuperscript{52} Finally, the Supreme Court has held that "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."\textsuperscript{53}

Under international standards, the right to liberty is a fundamental human right as recognized by several universal and regional human rights instruments including the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights ("Pact of San Jose"), among others.\textsuperscript{54} All of these instruments specify that no person should be arbitrarily deprived of his or her liberty.\textsuperscript{55} These protections apply to both refugees and asylum seekers.\textsuperscript{56}

II. The Attorney General's Decision in D-J-

A. The Holding

On April 17, 2003, the Attorney General issued a decision, constituting binding precedent\textsuperscript{57} for IJs and the BIA, that release on bond pending determination of the asylum claim of a Haitian man or "similarly situated undocumented seagoing migrants" was unwarranted due to "adverse consequences for national security and sound immigration policy" that such release from detention would trigger.\textsuperscript{58}

B. The Facts

In D-J-, a Haitian teenager\textsuperscript{59} named David Joseph\textsuperscript{60} arrived off the coast of Florida in a crowded vessel carrying 216 undocumented persons from Haiti and the Dominican Republic.\textsuperscript{61} The U.S. Coast Guard sought to interdict the vessel and then sought to apprehend the passengers after they

\begin{itemize}
\item \textsuperscript{51} The Vienna Convention on the Law of Treaties, supra note 49, art. 26.
\item \textsuperscript{52} Id. at art. 27.
\item \textsuperscript{53} Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
\item \textsuperscript{54} Executive Committee of the High Commissioner's Programme, Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice, EC/49/SC/CRP.13 (June 4, 1999) [hereinafter Detention of Asylum-Seekers and Refugees].
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id. See also supra note 44 for an explanation of the difference between an overseas "refugee" and a person already at the border of or within a third country who claims "asylum."
\item \textsuperscript{57} In re D-J-, 23 I. & N. Dec. 572, 581 (Att'y Gen. 2003).
\item \textsuperscript{58} Id. at 579.
\item \textsuperscript{60} Susan Benesch, Haitians Trapped by "War on Terrorism," AMNESTY NOW, at http://www.amnestyusa.org/amnestynow/haiti.html (last visited Nov. 22, 2004).
\item \textsuperscript{61} D-J-, 23 I. & N. 576.
\end{itemize}
reached U.S. soil. A group of arriving individuals tried to evade the Coast Guard and other law enforcement officials after coming ashore, although it was unclear whether David Joseph was among the persons trying to evade apprehension. David Joseph was placed in removal proceedings as an inadmissible alien under INA § 212(a)(6)(A)(i). He claimed asylum and was granted release on bond by the IJ pending determination of his status. The BIA dismissed the government’s appeal of his release on bond, “concluding . . . that the broad national interests invoked by INS were not appropriate considerations for the IJ or the BIA in making the bond determination, ‘absent contrary direction from the Attorney General.'”

David Joseph testified before the IJ that he had not been arrested or convicted of a crime, and that upon release on bond he would reside with and be cared for by his uncle in New York City while his asylum claim was pending. Despite these facts, the Attorney General was not persuaded that David Joseph “did not present a danger to the community, a risk of flight or a threat to national security.”

C. Application of U.S. Law

1. De Novo Review of Fact and Law

The Attorney General asserted de novo review of the IJ’s and BIA’s conclusions of both fact and law. While 8 C.F.R. § 1003.1(d)(3) precludes the BIA from de novo review of the IJ’s fact finding, the AG con-
cluded that those limits do not apply to his review because the recent promulgation of C.F.R. § 1003.1(d)(3) did not alter the previously articulated de novo standard governing the Attorney General's review. The Attorney General also cited INA § 103(a)(1) to assert "his authority to make controlling determinations with respect to questions of law arising under those statutes." Thus the Attorney General asserted the power to set aside the record developed below and to decide anew the legal and factual issues presented, regardless of whether the IJ or the BIA had erred.

2. Broad Discretion and Lack of Judicial Review

The Attorney General also asserted his broad discretion in determining whether an alien's release on bond is warranted. He buttressed that discretion by asserting the unreviewability of his decisions under INA § 236(e). That section seems to preclude judicial review of the Attorney General's decisions regarding detention or release of any alien. Nevertheless, the Attorney General acknowledged that his decision had to have a "reasonable foundation."

71. See D-J-, 23 I. & N. Dec. at 575 (citing Deportation Proceedings of John Patrick Thomas Doherty, 12 Op. O.L.C. 1, 4 (1988) for the proposition that the Attorney General "retains full authority to receive additional evidence and to make de novo factual determinations" when reviewing a case pursuant to 8 C.F.R. § 3.1(h)).


The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular offices: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

Id.

73. See id. at 575-76. The law governing the detention or release of aliens such as respondent (i.e., aliens arrested and detained pending a decision on removal) is set forth in section 236(a) of the INA. It provides that the Attorney General may (1) continue to detain the alien; or (2) release the alien on bond or conditional parole . . . . Further, the INA does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal.

Id.

74. See id. at 575 (noting that "the extensive discretion granted the Attorney General under the statute is confirmed by its further provision that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to [judicial] review" and citing I.N.A. § 236(e))).

75. I.N.A. § 236(e), 8 U.S.C. § 1226(e), reads in full:

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Id.

76. See D-J-, 23 I. & N. Dec. at 576 (citing Carlson v. Landon, 342 U.S. 524, 534 (1952), noting that the "Attorney General's denial of bail to alien is within his lawful discretion as long as it has a 'reasonable foundation'; United States ex rel. Barbour v.
3. National Security Grounds

After establishing his broad discretion to determine release on bond, the Attorney General concluded that "releasing respondent [David Joseph], or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and sound immigration policy." The Attorney General noted that releasing aliens such as David Joseph implicated national security interests because it would encourage further unlawful mass migrations from Haiti, divert Coast Guard and Department of Defense resources from counterterrorism and homeland security responsibilities when they must deal with such migrations, and fortify Haiti as a "staging point" for third country nationals such as "Pakistanis, Palestinians, etc." to reach the United States. Further, the Attorney General ordered IJs and the BIA to consider national security interests in all future bond proceedings of persons seeking to enter the United States illegally.

4. Due Process Rights of Inadmissible Aliens

Finally, the Attorney General addressed David Joseph's constitutional due process claim to an "individualized determination" rather than a blanket denial of release for all similarly situated persons. He distinguished David Joseph, an inadmissible undocumented alien, from lawful permanent residents who do have a due process right to an individualized hearing when subject to mandatory detention under INA § 236(c). He further distinguished David Joseph from aliens, once admitted and later ordered removed, who qualify for "limited due process protection." The Attorney General explained that even if David Joseph were afforded an individualized hearing, it would nonetheless be permissible for "general considerations applicable to a category of migrants" to be considered.

Dist. Dir. of I.N.S., 491 F.2d 573, 578 (5th Cir. 1974), noting that the "INS finding that alien was a threat to national security warranted denial of bond, applying 'reasonable foundation' standard; and Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 748 (9th Cir. 1972), noting that the "Attorney General's exercise of discretionary authorities under the INA must be upheld if they are founded 'on considerations rationally related to the statute he is administering.' ").

77. Id. at 579.
78. Id. at 579-80.
79. Id. at 581 ("Further, in all future bond proceedings involving aliens seeking to enter the United States illegally, where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests.").
80. Id. at 582.
81. See id. at 582-83 (referring to Demore v. Kim, 536 U.S. 956 (2002), which dealt with the due process rights of lawful permanent residents).
82. See id. (distinguishing Zadvydas v. Davis, 533 U.S. 678, 682 (2001), which dealt with the due process rights of aliens initially admitted and later ordered removed).
83. See id. at 583 (citing Reno v. Flores, 507 U.S. 292, 313-14, 314 n.9 (1993), for the proposition that "[t]he Attorney General is broadly authorized to detain respondent, and deny his request for bond, based on any reasonable consideration, individualized or general, that is consistent with the Attorney General's statutory responsibilities.").
D. Application of International Law

At the end of his opinion, the Attorney General dismissed David Joseph's argument that "an INS policy of detaining Haitian migrants in order to deter other Haitians from migrating to the United States seeking asylum violates international law." He concluded that David Joseph's reliance on the Universal Declaration of Human Rights Article 14 right to asylum, coupled with an advisory opinion of the United Nations High Commission for Refugees stating that "asylum seekers should not be detained for the purposes of deterrence," were insufficient to merit release on bond. He based his conclusion on the proposition that "the UDHR is merely a nonbinding expression of aspirations and principles, rather than a legally binding treaty." He also stated that "the application of U.S. law to protect the nation's borders against mass migrations by hundreds of undocumented aliens violates no right protected by the UDHR or any other applicable rule of international law." In support of this, he cited classic plenary power cases.

In reference to detention, the Attorney General asserted that the power to detain aliens is incident to the power to expel them, stating that "[t]he authority to expel aliens is meaningless without the authority to detain those who pose a danger or a flight risk during the process of determining whether they should be expelled." He concluded by noting that "[t]he national security interests invoked in this opinion are directed at unlawful and dangerous mass migrations by sea, not the right to seek asylum." Finally, in a footnote, the Attorney General pointed out that federal immigration laws—exclusively—afford asylum seekers all of the rights that they are due.

84. Id. at 584.
85. Id.
86. Id. (citing Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987)).
87. Id. at 584.
88. Id. (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977), which quotes Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953), "As the Supreme Court has recognized, '[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments . . . .").
89. Id.
90. Id.
91. Id. at 584 n.8.

The Protocol [Relating to the Status of Refugees] is not self-executing, but Congress has incorporated into the INA, through the Refugee Act of 1980, the appropriate requirements of the Protocol. Consequently, the Protocol does not afford respondent any rights beyond what he is afforded under the federal immigration laws, as applied in this decision. See Abdelwahed v. I.N.S., 22 Fed. Appx. 811, 815, 2001 WL 1480651 (9th Cir. 2001) (stating that "the Protocol does not give [the petitioner] any rights beyond what he already enjoys under the immigration statutes"); Legal Obligations of the United States Under Article 33 of the Refugee Convention, 15 Op. O.L.C. 86, 87 (1991) ("[T]he Protocol by which the United States adhered to the Convention is not self-executing for domestic law purposes. Accordingly, the Protocol itself does not create rights or duties that can be enforced by a court.").
III. Analysis

A. Application of U.S. Law

1. Foreclosing Judicial Review

a) Unchecked Administrative Power

"Even discretion . . . has its legal limits."\(^9\)

The Attorney General's broad discretion combined with plenary power’s stifling effect on judicial review has left noncitizens prey to arbitrary government action in immigration matters.\(^9\) The blanket detention without bond of noncriminal Haitian asylum seekers, with complete disregard of individualized determinations, is an extreme example of abuse of administrative power. I will demonstrate in the next sections that the Attorney General's decision in D-J extends well beyond the United States' historic hostility toward Haitian asylum seekers and that this most recent measure exceeds even the constitutional maxim that "Congress regularly makes rules [for noncitizens] that would be unacceptable if applied to citizens."\(^9\) In this section, I will demonstrate that D-J is a dangerous aberration from the legitimate use of administrative power.

Congress has charged the Attorney General with the administration and enforcement of U.S. immigration laws.\(^9\) As such, the Attorney General and immigration authorities under his supervision are part of the administrative state. The statute giving life to administrative agencies also enshrines judicial review to protect individuals from arbitrary and capricious agency action.\(^9\) Although the Supreme Court has held that the Administrative Procedure Act ("APA") does not apply to immigration proceedings,\(^9\) Justice Scalia has asserted that "abuse of discretion" review remains available "according to those standards of federal administration embodied in what we have described as the "the 'common law' of judicial review of agency action."\(^9\) According to Justice Scalia, if an abuse of discretion occurs, even in the immigration context, "courts are commanded by the judicial review provisions of the Administrative Procedure Act to 'hold [it] unlawful and set [it] aside.'"\(^9\)

Even in the immigration context, the Court has insisted on "the strong presumption in favor of judicial review of administrative action."\(^9\)

---

99. See id. (asserting that "[a]lthough the detailed hearing procedures specified by the APA do not apply to hearings under the Immigration and Nationality Act . . . the judicial review provisions do" and citing Shaughnessy v. Pedreiro, 349 U.S. 48 (1955)).
100. I.N.S. v. St. Cyr., 533 U.S. 289, 298 (2001); see also I.N.A. § 236(e), 8 U.S.C. § 1226(e) (attempting to overcome the presumption by stating that "[t]he Attorney Gen-
Administrative law scholars have asserted that judicial review of agency action is a necessary condition of a legitimate or legally valid system of administrative power. In response to congressional delegation of broad powers to the executive branch, the extreme example of which is seen in the immigration context, separation of powers considerations demand external controls on agency action through judicial review.

Based on these core principles of administrative law, reflected in the Supreme Court's reluctance to hand over an individual's fate to the unchecked power of government agencies, the Attorney General's assertion of broad discretion to deny bond should be subject to judicial review in all cases. Because INA § 236(e) blatantly usurps a core judicial function of reviewing the actions of an administrative agency where an individual's fundamental rights are at stake, it should be deemed unconstitutional. The call for judicial review of government action against noncitizens, however, invariably runs up against the plenary power doctrine. The next section will demonstrate that plenary power no longer justifies the unconstitutional treatment of inadmissible noncitizens.

b) Plenary Power & Due Process Rights of Inadmissible Persons

After the Supreme Court's 2001 decision in Zadvydas v. Davis, striking down the indefinite detention of deportable resident aliens, Professor Aleinikoff asked, "Is the plenary power doctrine dead?" Commentators have asserted, on various grounds, that it should die, and recent Supreme Court decisions reveal an eagerness to circumscribe it. The Court's strong rebuke of the Executive's wartime excesses outside of the immigration context coupled with the egregiously pretextual use of a national security justification in D-J- afford an opportunity for the long-awaited demise of the doctrine.

Courts and commentators have advanced many valid reasons for putting an end to the plenary power doctrine. In stark contrast with the express provision protecting all "persons" under the Fifth Amendment; general's discretionary judgment regarding the application of this section shall not be subject to review.

106. The Fifth Amendment is express: It mandates that "no person" shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V. Furthermore, the Court has affirmed the universal application of the Fifth Amendment to all
there is no support for "plenary power" in the text of the Constitution.\textsuperscript{107} The Court has sought to limit the doctrine from its earliest days\textsuperscript{108} and reserved for itself "a limited judicial responsibility under the Constitution" over Congress’s immigration power.\textsuperscript{109} Furthermore, the doctrine leaves the door open to unthinkable government abuses, such as torture or summary execution of inadmissible persons,\textsuperscript{110} and it is fully out of line with persons within the territory of the United States. See Mathews v. Diaz, 426 U.S. 67, 77 (1976):

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment . . . protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

Id. Justice Field recognized this over a hundred years ago: “The term ‘person,’ used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic.” Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part, dissenting in part).


That Congress has a power to control immigration, a power not rooted in any provision of the Constitution, is no more radical a jurisprudential innovation than are some others we have assimilated during our constitutional history. However, the accretions to that doctrine—notably the notion that immigration controls are not subject to the constitutional limitations applicable to congressional acts generally—cry out for the sharpest criticism.

Id.


But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ . . . . One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard . . . .”


According to the Yamataya Court, the plenary power doctrine is not a doctrine of absolute power, nor is it a means of circumventing the Constitution. Rather, it is a doctrine under which the political branches exercise broad authority, subject to the provisions of the Constitution . . . . The Constitution limits expressions of the plenary power, and the judiciary is empowered to enforce such limitation. That the judiciary has consistently failed to impose rigorous review on the immigration-related activities of the political branches does not make constitutional the statutory withdrawal of such review.

Id.

109. Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) (“Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . .”)

110. Courts have warned of the dangers of permitting the government unbridled power over inadmissible noncitizens. See Rosales-Garcia v. Holland, 322 F.3d 386, 410 (6th Cir. 2003) (en banc):

The fact that excludable aliens are entitled to less process, however, does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. If excludable aliens were not protected by even the substantive component of constitutional due process, as the government
modern understandings of the Constitution.\textsuperscript{111} Aforementioned criticisms notwithstanding, the AG’s decision in D-J avowed his belief in the continuing vitality of the plenary power doctrine, to the extent that he assumed away any constitutional right that David Joseph, as an inadmissible alien, may have claimed.\textsuperscript{112}

In \textit{Zadvydas},\textsuperscript{113} the Court pointed out that Congress’s plenary power to create immigration law “is subject to important constitutional limitations.”\textsuperscript{114} At the same time, however, the Court seemed to reaffirm the so-called “entry fiction,” noting that “[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”\textsuperscript{115} The Court also made clear that its decision, dealing with the indefinite detention of once lawfully admitted noncitizens, did not implicate “the political branches’ authority to control entry into the United States” nor “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches appears to argue, we do not see why the United States government could not torture or summarily execute them. Because we do not believe that our Constitution could permit persons living in the United States—whether they can be admitted for permanent residence or not—to be subjected to any government action without limit, we conclude that government treatment of excludable aliens must implicate the Due Process Clause of the Fifth Amendment.

\textit{Id.}; see also \textit{Xi v. U.S. I.N.S.}, 298 F.3d 832, 836 (9th Cir. 2002) (holding that the \textit{Zadvydas} holding that indefinite detention of once admitted aliens is unconstitutional also applies to inadmissible aliens who have not yet been admitted to the United States); \textit{Jean v. Nelson}, 472 U.S. 846, 873-74 (1985) (Marshall, J., dissenting):

Our case law makes clear that excludable aliens do, in fact, enjoy Fifth Amendment protections.

\ldots .

\ldots . [E]ven in the immigration context, the principle that unadmitted aliens have no constitutionally protected rights defies rationality. Under this view, the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens.

\textit{Id.}

\textsuperscript{111} See Aleinikoff, supra note 105, at 374 (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953), which notes that the infamous phrase “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned’ . . . is wildly out of step with modern constitutional law.”); see also Hiroshi Motomura, \textit{The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights}, 92 COLUM. L. REV. 1625, 1626 (1992) (“The stunted growth of constitutional immigration law contrasts sharply with the flowering of constitutional protections for aliens in areas other than immigration law.”).

\textsuperscript{112} See \textit{In re D-J}, 23 I. & N. Dec. 572, 583 (Att’y Gen. 2003) (quoting Zheng v. I.N.S., 207 F. Supp. 2d 550, 552 (E.D. La. 2002) as holding that “[t]he detention of aliens who have been denied initial admission into the United States does not implicate the Fifth Amendment, even if such aliens were subsequently paroled or released within the country.”). David Joseph, charged as inadmissible, would be “legally considered to be detained at the border and hence as never having effected entry into this country.” \textit{Id.} Inadmissible aliens are distinguishable from lawful permanent residents who have been held to have due process rights entitling them to protections such as an individualized bond hearing. \textit{Id.} at 582 (citing Demore v. Kim, 536 US. 956 (2002)).


\textsuperscript{114} \textit{Id.} at 695.

\textsuperscript{115} \textit{Id.} at 693.
with respect to matters of national security." For these reasons, Professor Aleinikoff unhappily concluded that Zadvydas, although a victory for fundamental justice, did not portend the death of the plenary power doctrine.

There have been important developments following the Court's decision in Zadvydas and Professor Aleinikoff's commentary that would seem to favor, if not the death, at least a diminution of the plenary power doctrine as applied to David Joseph and similarly situated persons. First, the Sixth and Ninth Circuits have read the restraint imposed on plenary power in Zadvydas to extend to inadmissible persons as well. Second, the Supreme Court signaled, in a recent series of cases dealing with the detention of so-called "enemy combatants," that it would not tolerate unbridled executive power even in wartime, even over noncitizens not within the territory of the United States.

---

116. Id. at 695–96.

117. See Aleinikoff, supra note 105, at 375:

The reaffirmation of the border/interior distinction as a constitutional matter in Zadvydas represents a particularly unhappy result. Not only is it hard to square with logic or the statutory structure, it also places in constitutional no-man's land literally tens of millions of persons who face state power at U.S. borders each year.

Id. Aleinikoff further found that:

Zadvydas, for all its Warren Court-like rulemaking, takes no steps toward ensuring what is most needed in the immigration detention system: meaningful judicial review of ordinary detention decisions. Finally, given the terrible events of the day, the courts are not likely to restrict the attempts by the other branches to exploit the escape clauses in the opinion for [terrorism and national security] . . . . Zadvydas will probably come to look a lot like Plyler v. Doe: a case that stands for fundamental justice more than constitutional logic—one that is unlikely to be overturned but also unlikely to chart a major change in constitutional law.

Id. at 366–67.

118. It should be noted that Zadvydas dealt with indefinite detention. As of August 2004, David Joseph has been in federal custody in Miami for almost two years. Bob Herbert, Ashcroft's Quiet Prisoner, N.Y. TIMES, Aug. 13, 2004, at 21. Although his term of detention well surpasses the 6-month presumption of “reasonable detention” that the Court laid down in Zadvydas, 533 U.S. at 701, the arguments in this Note against David Joseph's detention without bond do not turn on the length of his detention. As such, it is a harder argument to make than the indefinite detention cases, but nonetheless what this Note seeks to accomplish.

119. Guo XI v. I.N.S., 298 F.3d 832, 834 (9th Cir. 2002); Rosales-Garcia v. Holland, 322 F.3d 386, 405-06 (6th Cir. 2003). But see Borrero v. Aljets, 325 F.3d 1003, 1007 (8th Cir. 2003); Benítez v. Wallis, 337 F.3d 1289, 1301 (11th Cir. 2003); Rios v. I.N.S., 324 F.3d 296, 297 (5th Cir. 2003); Hoyte-Mesa v. Ashcroft, 272 F.3d 989, 991 (7th Cir. 2001), cert. denied, 537 U.S. 701 (2002); Sierra v. Romaine, 347 F.3d 559, 576 (3d. Cir. 2003).

120. See Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2639 (2004) (concerning a writ of habeas corpus filed by an American citizen captured in the U.S. invasion of Afghanistan and removed to a prison ship off the coast of South Carolina); Rasul v. Bush. 124 S.Ct. 2686, 2698–99 (2003) (involving a challenge by captured Kuwaiti and Australian citizens, who were allegedly fighting for the Taliban in Afghanistan, to the legality of their detentions on Guantanamo).
In *Hamdi v. Rumsfield*, the Court issued a strong rebuke to executive excesses while affirming the fundamental role of the courts in protecting individual liberty, especially in wartime:

We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.\(^1\)

Finally, given the recent erosion of plenary power and admonition against abuse of executive power during wartime, *D-J- presents a compelling case for sounding the death knell for plenary power. The historic animosity of the U.S. government towards Haitian asylum seekers makes plain that the Attorney General's use of a national security justification and war on terrorism rhetoric in *D-J- is a pretext for dealing harshly, once again, with a despised immigrant group.\(^2\) What is really behind David Joseph's detention is the government's desire to send a message, once and for all, to Haitian asylum seekers that they are not welcome in the United States.\(^3\) After interdiction on the high seas and incommunicado imprisonment on Guantanamo Bay, the Attorney General's blanket detention of Haitian asylum seekers who do manage to reach U.S. shores is a last-ditch effort to deter their attempts to seek refuge in the United States. The Attorney General himself expressly stated that the essential purpose of detaining David Joseph is to deter other Haitians from coming:

> [T]he release of respondent [David Joseph] and hundreds of others from the October 29 migrant group would strongly undercut any resultant deterrent effect arising from the [expedited removal] policy. The persistent history of mass migration from Haiti, in the face of concerted statutory and regulatory measures to curtail it, confirms that even sporadic successful entries fuel further attempts.\(^4\)

Of course, the Attorney General's deterrent rationale is grounded in a fundamental concept of the penal system—to inflict punishment, here imprisonment—on some in order to deter others. Not coincidentally, detention centers for immigration law violators are the same as prisons housing criminal offenders.\(^5\) A key difference is that convicted criminals, including criminal aliens, enjoy a host of constitutional protections before being deprived of their liberty.\(^6\) With his decision in *D-J-*,
the Attorney General hopes to send a message to would-be Haitian asylum seekers: if you try to come here, we will not look at your individualized circumstances; rather we will punish all of you with imprisonment. The government, however, may not use its immigration power, including detention to effect removal, for punitive purposes.127

In an early case outlining the contours of plenary power, the Court, characteristic of the day, affirmed the racist application of Congress's immigration power,128 but stopped short of permitting Congress to punish persons unlawfully present: “[T]o declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation . . . .”129 While Congress has not gone so far as to expressly legislate the detention of all Haitians illegally present in the United States, the decision in D-J, subjecting individuals like David Joseph to “generalized” considerations equally applicable to all arriving Haitians, is effectively a per se rule that reaches the same result. If the Court would strike down congressional legislation mandating the imprisonment of all arriving Haitians, it must not allow the Attorney General to reach the same end through enforcement of the law.

Thus, the Court should see through the Attorney General’s “national security” justification as a pretext for punishing Haitian asylum seekers, and, accordingly, afford constitutional protection to David Joseph. If the Court undermines the plenary power doctrine by recognizing David Joseph as a “person” protected by the Due Process Clause of the Fifth Amendment, then the judicial review-stripping device of INA § 236(e) should be found unconstitutional since it seeks to deprive the courts of jurisdiction to hear challenges to detentions that implicate Fifth Amend-


[D]ue process places significant constraints on the government's power to detain individuals pursuant to immigration authority. Because the immigration power cannot be used punitively, the government may not take a noncitizen's liberty without an individualized showing that the person poses either a danger to the community or a risk of flight.

128. See Wong Wing v. United States, 163 U.S. 228, 237 (1896): No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.

129. Id.
ment rights. Even if INA § 236(e) stands, however, David Joseph still has the opportunity for the Court to review a challenge to his detention through habeas corpus. The next section demonstrates that his right to habeas review is still available in spite of INA § 236(e), but argues that habeas by itself is insufficient to ensure a regularized system of judicial review of discretionary detention decisions.

c) Availability of Habeas Relief

Habeas corpus relief is available in spite of the language of INA § 236(e) barring judicial review of the Attorney General's discretionary judgment. A nonresident alien qualifies as a "person" who may seek habeas relief to challenge his detention. Section 236(e) of the INA reads:

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Because the preclusion of judicial review of the Attorney General's discretionary decisions appears in absolute terms, there has been concern that the language covering decisions by the Attorney General "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole" implicates preclusion of habeas corpus relief as well. However, in its recent decision, Demore v. Kim, the Supreme Court held that to bar habeas corpus relief, Congress must evince a clear statement of its intent to do so. Thus, contrary to the Attorney General's insistence in D-J- that his decision whether to release an alien on bond is effectively unreviewable due to his grant of "extremely broad discretion," Demore supports the proposition that federal courts retain jurisdiction to grant habeas relief to inadmissible persons such as David Joseph in spite of the language contained in INA § 236(e).

130. See Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 383 (3d. ed. 1988) (noting that if Congress "clo[sed] the doors of the federal courts in federal question cases to plaintiffs who were black, or Jewish, the provision would surely violate the equal protection component of the Fifth Amendment"); Richard H. Fallon, Jr., Response, Applying the Suspension Clause to Immigration Cases, 98 Colum. L. Rev. 1068, 1089-90 (1998) (noting that even if Congress confers a particular power "in terms that appear in isolation to be unqualified, that power may still be subject to restraints arising from other provisions of the Constitution").


132. I.N.A. § 236(e), 8 U.S.C. § 1226(e).

133. Id.


137. See Demore, 538 U.S. at 517.
Although retention of habeas review of immigration-related detentions is important, it is an extraordinary remedy that is insufficient to meet the system-wide demands of detained persons. Lack of a standard avenue for judicial review puts greater procedural burdens on noncitizens because few immigration attorneys are familiar with filing for habeas—even if the detained noncitizen is fortunate enough to have an attorney in the first place—and, more importantly, because habeas requires that the deprivation of liberty take place before the court may review the government’s action. The effect, therefore, of precluding judicial review is not merely procedural. Rather, the noncitizen must necessarily suffer a loss of his substantive right to liberty before the court may have an opportunity to review.

2. Decided Wrongly on the Merits

The previous sections dealt with the attempts of Congress and the Attorney General to cut off David Joseph from judicial review of his bond decision. This section addresses the Attorney General’s decision on the merits. It concludes that denial of bond to David Joseph and “similarly situated persons,” with no regard to individualized considerations, constitutes an unreasonable and unjustifiable blanket detention. Furthermore, the larger statutory framework at issue in D-J- illustrates that Congress did not intend to make Haitians—in contrast to “terrorists”—dangerous as a matter of law, as the D-J- decision accomplishes.

a) Lacks a Reasonable Foundation

First, it is important to ascertain the substantive due process interest at stake in D-J-. Government detention of an individual that is based on generalized national security concerns and that denies the individual the opportunity for a predetention hearing infringes a noncitizen’s “liberty interest.” This liberty interest encompasses a person’s right to be free from undue restraints on movement imposed by the government. While we might view government detention as less severe than, torture, for example, it is important to note that detention for immigration purposes and imprisonment are both forms of government custody that deprive persons of their liberty.

In D-J-, the Attorney General asserted that the discretionary factors he may consider in determining whether to detain an alien are not limited by...
the INA.\textsuperscript{142} He would typically consider "the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail."\textsuperscript{143} But in determining that David Joseph should remain incarcerated, the Attorney General was unguided by these usual considerations. Instead, the Attorney General relied on certain generalized scenarios offered by the government that could implicate a national security interest.\textsuperscript{144} Principally, he hoped to conserve the terror-fighting resources of the U.S. Coast Guard by detaining arriving Haitians to deter their future entry attempts as well as the attempts of Pakistani, Palestinian, and other third country nationals seeking to enter the United States by way of Haiti. The Attorney General's proffered justifications for why Haitian asylum seekers must be detained without bond on national security grounds were, however, wholly unrelated to the individual characteristics of David Joseph.\textsuperscript{145}

The Attorney General did acknowledge, however, that his decision to deny bail must meet the "reasonable foundation" standard articulated in \textit{Carlson v. Landon}.\textsuperscript{146} In \textit{Carlson}, noncitizen members of the Communist Party were arrested under the Internal Security Act of 1950 and held without bond pending determination of deportability.\textsuperscript{147} In habeas corpus proceedings, the petitioners alleged that the Act's mandating their detention was unconstitutional and that denial of bail was an abuse of discretion.\textsuperscript{148} The Supreme Court held that discretion in granting or denying bail could be overridden when it was clear that the discretionary decision lacked a reasonable foundation.\textsuperscript{149} In the \textit{Carlson} case, where petitioners actively engaged in Communist work, the Court found the discretionary

\begin{itemize}
\item \textsuperscript{142} \textit{In re D-J}, 23 I. & N. Dec. 572, 576 (Att'y Gen. 2003).
\item \textsuperscript{143} Carlson v. Landon, 342 U.S. 524, 539 n.33 (1952).
\item \textsuperscript{144} \textit{See D-J}, 23 I. & N. Dec. at 579-80. The Attorney General noted that the release of aliens such as David Joseph implicated national security interests because it would encourage further unlawful mass migrations from Haiti, divert Coast Guard and Department of Defense resources from counterterrorism and homeland security responsibilities when they must deal with such migrations, and fortify Haiti as a "staging point" for Pakistani, Palestinian, and other third country nationals to reach the United States. \textit{Id.} at 576 (citing Carlson v. Landon, 342 U.S. 524, 534 (1952)). Cf. \textit{Jeanty v. Bulger}, 204 F. Supp. 2d 1366, 1373 (S.D. Fla. 2002), aff'd sub nom. \textit{Moise v. Bulger}, 321 F.3d 1336 (11th Cir. 2003), \textit{cert. denied}, 2003 U.S. LEXIS 8367 (2003) (using a "facially legitimate and bona fide reason" standard).
\item \textsuperscript{146} \textit{See id. at 576} (citing Carlson v. Landon, 342 U.S. 524, 534 (1952)).
\item \textsuperscript{147} \textit{Carlson v. Landon}, 342 U.S. 524, 528-529 (1952).
\item \textsuperscript{148} \textit{Id. at 529-32}.
\item \textsuperscript{149} \textit{Id. at 539 n.33}.
\end{itemize}
denial of bail was justifiable as being in the public interest.\textsuperscript{150}

Although a self-imposed "reasonableness" limitation, with no external review, would seem to constitute no check at all on the Attorney General's power, the "reasonable foundation" standard articulated in \textit{Carlson} and applied in \textit{D-J-} provides a basis for the Court to review the Attorney General's exercise of discretion to deny bond.

The Attorney General relied on \textit{Carlson} to support his "extensive discretion" to make bond determinations.\textsuperscript{151} However, \textit{Carlson} was implicitly grounded on the Court's belief that the Attorney General would use his discretionary power to refuse to grant bond only against noncitizens who would "hurt the United States during the pendency of deportation proceedings."\textsuperscript{152} The Court expressly stated that "[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion [to detain without bail] was placed . . . in the Attorney General . . . "\textsuperscript{153}

If \textit{Carlson}'s "reasonable foundation review" were employed to evaluate the Attorney General's detention without bond of Haitian asylum seekers, his decision would not stand. While detaining terrorists and suspected terrorists arguably has a "reasonable foundation" based on "national security grounds," stretching "national security interests" to encompass detention of Haitian asylum seekers lacks such a "reasonable foundation." The Attorney General asserted that the national security interests implicated by granting bond in \textit{D-J-} were encouragement of further unlawful migrations from Haiti that divert Coast Guard and Department of Defense resources from counterterrorism and homeland security responsibilities and fortification of Haiti as a launch pad to the United States for third country nationals such as "Pakistanis, Palestinians, etc."\textsuperscript{154} However, according to the U.S. Coast Guard's website, on an "average day," the Coast Guard will "assist 136 people in distress, . . . conduct 106 search and rescue cases, . . . [and] teach boating safety courses to 289 boaters."\textsuperscript{155} In stark contrast to these numbers, the Coast Guard will interdict only "15 illegal migrants at sea" on the "average day."\textsuperscript{156} Based on this reasoning, the Attorney General could detain noncitizen beach-goers who divert the resources of the Coast Guard when they are attacked by sharks.\textsuperscript{157} Similarly, noncitizens

\textsuperscript{150} Id. at 541.
\textsuperscript{152} \textit{Carlson}, 342 U.S. at 538.
\textsuperscript{153} Id.
\textsuperscript{156} See id.
who are poor swimmers, leisure boaters, and fishermen\(^\text{158}\) could be subject to detention for the drain they impose on Coast Guard resources.

It is unprecedented to extend the class of presumptively harmful aliens, such as convicted criminals, suspected terrorists, and (former) Communists, to a group of persons whose only purported harmfulness appears to be diversion of Coast Guard resources and supposed accessibility as a launch pad to the United States for third country nationals. The government provided no statistics on the number of third country nationals entering the United States via overcrowded sea-going vessels from Haiti. In fact, in response the Attorney General's invocation of a "State Department declaration" to support his assertion that "Pakistanis, Palestinians, etc." are "using Haiti as a staging point for attempted migration to the United States,"\(^\text{159}\) a State Department spokesman stated, "We all are scratching our heads, [w]e are asking each other, 'Where did they get that?'"\(^\text{160}\) Further, even if the government could find some support for its otherwise baseless "third country national" claim, an individualized bond determination would facilitate the government's ability to pick out third country nationals from the majority of Haitian asylum seekers arriving with them.

Further, any country, including the United States's closest allies, can serve as a conduit for third country nationals to reach the United States. For example, many of the September 11th hijackers entered the United States after extended stays in European countries such as Germany.\(^\text{161}\) If the Attorney General's decision in D-J- were held to have a "reasonable foundation," the national security net could be cast to detain inadmissible aliens from any and all countries. Although ordering detention of Haitian asylum seekers rather than nationals of all countries might make the Attorney General's decision underinclusive, though not necessarily unconstitutional per se, the Court should assert review to check an abuse of the discretion to deny bail that perniciously singles out Haitian asylum seekers because of some invented association between them and "Pakistanis, Palestinians, etc."—a move that in itself presents a problematic "deployment of the Muslim-terrorist equation."\(^\text{162}\)

\(^{158}\) See generally U.S. Coast Guard Headlines Archive (listing press releases showing Coast Guard actions to rescue poor swimmers, leisure boaters, and fishermen), http://www.uscg.mil/news/archives.htm (last visited Nov. 22, 2004).


Mere mention of "Pakistanis, Palestinians, etc." [in D-J-] . . . is sufficient to establish a terrorist concern regarding the flow of refugees from Haiti with almost no further analysis or facts . . . . Pakistanis and Palestinians represent some larger class of people, as evident by the "etc." which follows . . . . It seems quite clear
Subjecting the Attorney General's decision to Carlson's "reasonable foundation" review would require the government to show that David Joseph himself would "hurt the United States during the pendency of [removal] proceedings." This would require an individualized assessment that poke a hole in the AG's blanket determination, based on generalized considerations, equally applicable to all arriving Haitian asylum seekers.

b) Contrary to Statutory Construction

In Carlson, unlike in D-J-, the alien seeking bond, a Communist, was part of a class of aliens statutorily defined as excludable based on security concerns. The Carlson Court held that in light of the Internal Security Act, whose "purpose [was] to deport all alien Communists as a menace to the security of the United States," it was within the Attorney General's discretion to detain without bail aliens "active in Communist work." In so holding, the Court relied upon Congress's assessment of Communist aliens as a threat to security. The Attorney General's discretionary decision to deny bail to Communist aliens was plainly supported by Congress's express assessment of the danger posed by such persons. The Carlson Court's reasoning that detention without bail was meant only for aliens who would "hurt the United States during the pendency of deportation proceedings" was compatible with Congress's assessment of the threat posed by Communist aliens—thus, the Court was able to find the detention of such persons within the lawful exercise of the Attorney General's discretion.

In D-J-, the Attorney General did precisely what the Carlson Court counseled against: He imputed a "purpose to injure" on Haitian asylum seekers generally, and he used it to justify their detention without bond. While Congress and the immigration authorities have made extensive efforts to keep Haitians from entering the United States illegally, Congress has not statutorily defined Haitians as a threat to national security as it had Communists in the Carlson era and terrorists today. In fact, congressional will seems very much to the contrary. Senator Arlen Specter of the Senate Judiciary Committee urged Attorney General Ashcroft to consider cases like David Joseph's on a "more individual" basis, to determine

that it is not intended to include Irish, Italian, or Guatemalan citizens, just as it seems clear that it is intended to include Syrian, Indonesian, and Saudi citizens . . . . Thus, in the government's usage, Pakistanis and Palestinians do not represent third country nationals, but third country Muslims . . . .

164. Id.
165. Id. at 541.
166. Id.
167. Id. at 538.
168. See id.
169. See supra note 7.
170. See supra note 22.
whether any real concerns about terrorism exist.\textsuperscript{171} In response to Senator Specter's questioning, the Attorney General stated: "Sometimes individual treatment is important. Sometimes it's important to make a statement about groups of people that come."\textsuperscript{172} It is the job of Congress, however, not the Attorney General, to make such "statements" about immigrant groups. Of course, Congress accomplishes this through duly enacted legislation that is subject to judicial review. Even if Congress did define Haitians or any other nationality, ethnic or racial group as presumptively dangerous and therefore subject to detention based solely upon membership in the group, the Court would likely strike down such a discriminatory classification.\textsuperscript{173}

Certainly since September 11th, Congress was concerned about giving immigration authorities a way of deterring aliens who might present a threat to "national security." Congress dealt with its concerns about terrorists and suspected terrorists in INA Sections §§ 236A\textsuperscript{174} and 212(a)(3)(b).\textsuperscript{175} The fact that Congress has already statutorily defined a class of persons it deems dangerous makes the Attorney General's assessment of the danger posed by Haitian asylum seekers seem still more pretextual.

In \textit{D-J-}, the Attorney General imported these specific national security-premised themes into his discretionary decisions under INA § 236(a). However, if Congress wanted "national security" to be one of the factors taken into account to determine release on bond under INA § 236(a), Congress could have stated it. Of course, immigration officials may always look to the "Security and related grounds" enunciated in INA § 212(a)(3) to determine whether an individual alien poses a threat. Similarly, aliens who may threaten national security, e.g., suspected terrorists, are dealt with in INA § 236A. The importation of the "national security" justification to preclude release on bond for Haitian asylum seekers would imply that Congress duplicated efforts in enacting INA § 236(a) when INA § 212(a)(3) and INA § 236A were clearly sufficient to deal with threats to security posed by aliens.

**B. Application of International Law**

The Attorney General's opinion summarily dismissed the proposition that the United States has obligations to asylum seekers under international law that would restrain the Attorney General's power to detain

\begin{itemize}
\item \textsuperscript{171} Herbert, \textit{supra} note 118.
\item \textsuperscript{172} \textit{Id}.
\item \textsuperscript{173} See, e.g., \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 374 (1886) (holding unconstitutional under the Fourteenth Amendment discrimination against Chinese aliens in the operation of San Francisco laundry businesses where "no reason for [the discrimination] exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified").
\item \textsuperscript{174} \textit{I.N.A.} § 236A, 8 U.S.C. § 1226(a), pertains to "[m]andatory detention of suspected terrorists; habeas corpus; judicial review."
\item \textsuperscript{175} \textit{I.N.A.} § 212(a)(3)(B), 8 U.S.C § 1182(a)(3)(B), deals with exclusion of aliens for terrorist activities.
\end{itemize}
He asserted that U.S. law trumps any rights of asylum seekers that are derived from international law, stating that “[i]n any event, the application of U.S. law to protect the nation’s borders against mass migrations by hundreds of undocumented aliens violates no right protected by the UDHR or any other applicable rule of international law.” However, the language in which he refers to asylum seekers like David Joseph as “undocumented aliens” followed immediately by his reliance on traditional plenary power cases suggests that the Attorney General has ignored the distinction that international law draws between “undocumented aliens” and asylum seekers. Although the Attorney General pointed out that David Joseph’s asylum claim remained pending on appeal, throughout his opinion, he refers to David Joseph and similarly situated Haitian asylum seekers as “undocumented migrants” or “undocumented aliens.”

Nonetheless, the Attorney General’s characterization of the asylum seekers as undocumented or illegal entrants to the United States does not divest them of the protections duly afforded to them as asylum seekers under both U.S. and international law. Nor do doubts on the part of the Attorney General that David Joseph’s asylum claim will be successful on the merits provide a basis for classifying asylum seekers as “undocumented migrants.” Because the Attorney General purposefully conflated the status of asylum seekers with that of undocumented migrants, he was able to cursorily evaluate and dismiss David Joseph’s international law arguments. However, had the Attorney General properly characterized David Joseph as an asylum seeker, he would have had to overcome the protections afforded asylum seekers under international law.

The Attorney General’s assertion that federal immigration law provides the sole basis for ascertaining the rights of asylum seekers in the United States ignores the fact that the United States is party to the 1967 Protocol Relating to the Status of Refugees, which incorporates the core

177. Id.
178. Id. ("As the Supreme Court has recognized, 'The power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments . . . .'
179. Id. at 582 ("I note that the respondent was denied asylum by the Immigration Judge on February 12, 2003. The respondent appealed that decision to the BIA on March 14, 2003, and that appeal remains pending.").
180. Id. The Attorney General stated:
   The IJ's denial of the respondent's application for asylum increases the risk that the respondent will flee if released from detention. A respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation hearing than one who, based on a criminal record or otherwise, has less potential of being granted such relief.
   Id. (internal citation omitted).
articles of the Refugee Convention. As a party to the Protocol, under the Vienna Convention, the United States has a good faith obligation to perform to the specifications of the Convention, and it may not invoke its domestic immigration laws as an excuse for failing to perform its obligations to asylum seekers. Additionally, the acts of Congress authorizing the Attorney General’s broad and unreviewable discretion to detain asylum seekers based on generalized national security interests may be a construction that violates international law concerning human rights and freedom from detention.

The Attorney General’s decision to treat asylum seekers the same as other undocumented aliens ignores the distinct situation of arriving asylum seekers who may be forced by circumstances to enter a country illegally in their efforts to escape persecution in their home countries. Article 31 of the Convention forbids the United States from imposing penalties on asylum seekers on account of their illegal entry or presence provided that they present themselves to the authorities without delay and show good cause for their illegal presence or entry. It is unclear from the facts of whether or not David Joseph was among the persons trying to evade capture by the Coast Guard when their vessel landed in Florida.

It is difficult, though, to assert that David Joseph waived his right under the Convention to be free from penalties by not presenting himself to the authorities without delay because he was immediately apprehended by the authorities upon his arrival. Article 31 further provides that the United States shall not restrict the movements of asylum seekers beyond what is “necessary.”

Article 9 (Provisional Measures) of the Refugee Convention provides:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Although Article 9 clearly allows a state to derogate from the Convention in the interests of national security, the language “in the case of a particular person” clearly means that a national security justification must be applied by an individualized determination rather than by a blanket approach, as used by the Attorney General in . Additionally, failure to adequately analyze an asylum seeker’s individual circumstances and an absence of

183. See Protocol Relating to the Status of Refugees, supra note 44.
184. See supra notes 51–52 and accompanying text.
185. See supra notes 54–56 and accompanying text.
187. See id. at art. 31(1).
190. Id. at art. 9.
judicial review of a detention determination constitutes an arbitrary detention.¹⁹¹

Conclusion

Judicial review provides a safety valve for the protection of individuals and imposes a check on abuse of government power. The Attorney General’s decision in \textit{D-J-} represents an unreasonable abuse of discretion that should be checked by the judiciary in all cases. Statutory withholding of judicial review under INA § 236(e), in combination with de novo determination of both fact and law by the Attorney General, lays the foundation for unchecked power. In \textit{D-J-}, the Attorney General abused his power by ignoring individual circumstances in favor of generalized "national security" considerations that were really a pretext for imposing punishment on an undesirable immigrant group. Whether Congress changes INA § 236(e) or the Court strikes it down as unconstitutional, there must be regular judicial review of immigration-related detentions. Reference to protections afforded to asylum seekers under international and U.S. law further demand a check on the Attorney General’s power to order such detentions.

¹⁹¹. \textit{See Detention of Asylum-Seekers and Refugees, supra note 54, ¶ 14, 25.}