

4-1-1992

Doherty v. Thornburgh - Deportable Aliens Detained and Deprived of Their Liberty: A Substantive Due Process Analysis

Michael H. Williams

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Michael H. Williams, *Doherty v. Thornburgh* - Deportable Aliens Detained and Deprived of Their Liberty: A Substantive Due Process Analysis, 18 Brook. J. Int'l L. 845 (1992).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol18/iss3/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

DOHERTY v. THORNBURGH — DEPORTABLE ALIENS DETAINED AND DEPRIVED OF THEIR LIBERTY: A SUBSTANTIVE DUE PROCESS ANALYSIS

I. INTRODUCTION

The Fifth Amendment of the United States Constitution protects a person's interest in liberty through its guarantee of due process of law.¹ All individuals within the United States receive this constitutional protection regardless of their citizenship.² In analyzing the substantive due process rights of individuals who are not citizens of the United States, however, the federal government's plenary control over immigration matters becomes an additional consideration.³ This Comment will address the difficulties that arise in determining the point at which the regulation of immigration by the government impinges upon the liberty interests of individual aliens.

Congress has enacted laws which permit the detention of aliens who are unlawfully in the United States.⁴ These statutes prescribe a period of time during which the Attorney General may detain an alien before deportation.⁵ Additional procedures are included which provide discretionary release on bond if the Attorney General finds it appropriate.⁶ However, while the

1. The Due Process Clause of the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

2. *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("[E]ven aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

3. *See infra* notes 123-137 and accompanying text.

4. *See, e.g.*, 8 U.S.C. § 1252(a)(1) (1988). The statute provides, in part: "Pending a determination of deportability in the case of any alien . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody." *Id.*

5. 8 U.S.C. § 1252(c) (1988): "When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States"

6. 8 U.S.C. § 1252(a)(1) (1988) provides that an alien arrested under an immigration warrant and "taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than \$500 with security approved by the

power to expel aliens belongs to the legislative and executive branches of the government, this power remains "subject to judicial intervention under the paramount law of the [C]onstitution."⁷ The judiciary must intervene when the government's implementation of its immigration laws violates the constitutional rights of a deportable alien.⁸

In *Doherty v. Thornburgh*,⁹ the Second Circuit reaffirmed that "aliens do have a substantive due process right to be free of arbitrary confinement pending deportation proceedings."¹⁰ The court nonetheless found that the Fifth Amendment rights of Joseph Doherty, an alleged Irish Republican Army terrorist who had not been charged with a crime in the United States, had not been violated by his eight-year confinement.¹¹ In reaching this result, the court undervalued the due process protection afforded to aliens in light of competing governmental interests.

Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole."

Following a final order of deportation, "at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe" for the six month period, excluding judicial review, in which the deportation must be effected. 8 U.S.C. § 1252(c) (1988).

7. *Carlson v. Landon*, 342 U.S. 524, 537 (1952). The deportation statute itself provides for judicial review of the Attorney General's detention decision:

Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.

8 U.S.C. § 1252(c) (1988). See also *Flores v. Meese*, 942 F.2d 1352, 1358 (9th Cir. 1991), cert. granted, *Burr v. Flores*, 112 S. Ct. 1261 (1992) ("A crucial component of the right to personal liberty is the ability to test the legality of any direct restraint that the government seeks to place on that liberty."); ELLEN GYTEL GORDON & CHARLES GORDON, IMMIGRATION LAW AND NATIONALITY LAW § 17.03[2][a] (1992) ("The Due Process Clause of the Fifth Amendment of the United States Constitution applies to deportation proceedings.").

8. See *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982); *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 . . ."); *Fernandez-Santander v. Thornburgh*, 751 F. Supp. 1007, 1009 (D. Me. 1990) ("The courts' deference to the 'plenary power' of Congress is limited essentially to Congress's decision regarding who is excludable; it does not extend to their treatment during the deportation process.").

9. 943 F.2d 204 (2d Cir. 1991), cert. dismissed, 112 S. Ct. 1254 (1992).

10. *Id.* at 209.

11. *Id.*

This Comment analyzes the extent to which substantive due process should protect aliens who are confined while awaiting deportation. This Comment proposes a constitutional analysis which is analogous to the approach used in evaluating the substantive due process limits on pretrial detention. This test properly balances the government's interests in controlling immigration and carrying out its foreign policy with the individual's interest in being free from prolonged confinement. Thus, the test must weigh the length of the deportable alien's confinement and the government's responsibility for any delay against the risk that the alien will abscond and the special deference given to the government's decision in light of its unique role as the maker of foreign policy. Had the Second Circuit applied this constitutional test to the *Doherty* case, it would have concluded that the length of his detention violated his due process rights under the Fifth Amendment. Furthermore, by using a principled approach, the court would have avoided setting a dangerous precedent which sanctions indefinite detention of aliens.

II. *DOHERTY v. THORNBURGH*

A. *Facts*

Joseph Doherty, a native of Northern Ireland and member of the Provisional Irish Republican Army (PIRA), was convicted of murder in absentia¹² by a court in Great Britain in 1981 for the killing of a British army captain.¹³ The conviction stemmed from a confrontation in Northern Ireland between PIRA members and British soldiers.¹⁴ Before the court's final decision and a sentence of life imprisonment, Doherty escaped from the prison where he was being held.¹⁵ After remaining in hiding in the Republic of Ireland, he entered the United States in February 1982 using a false passport.¹⁶

In June 1983, federal agents arrested Doherty and charged him with having entered the United States illegally. He was held without bail in the Metropolitan Correctional Center, a federal

12. See *infra* note 15 and accompanying text.

13. *Doherty v. Thornburgh*, 943 F.2d at 205.

14. *Id.*

15. *Doherty v. Thornburgh*, 750 F. Supp. 131, 132 (S.D.N.Y. 1990), *aff'd*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

16. *Doherty v. Thornburgh*, 943 F.2d at 205. American PIRA sympathizers helped Doherty obtain false identification, join a union, and gain employment at a Manhattan bar. *Id.*

pretrial detention center in New York City.¹⁷ From that point onward, Doherty remained in detention throughout separate deportation, extradition, bail, and habeas corpus proceedings.¹⁸

Acting on behalf of the United Kingdom,¹⁹ the United States began extradition proceedings against Doherty.²⁰ Doherty subsequently requested that his deportation proceedings be held in abeyance.²¹ In December 1984, the extradition request was denied because the district court concluded that Doherty's acts fell within the "political offenses" exception to the extradition treaty.²² The government unsuccessfully sought collateral review of the decision.²³

Upon resolution of the extradition proceedings in 1986, Doherty requested resumption of his deportation proceedings. He conceded his deportability²⁴ and designated the Republic of Ire-

17. *Id.*

18. *Id.* at 205-08. Congress has given the Attorney General the right to keep an alien in detention pending a final order of deportation. 8 U.S.C. § 1252(c) (1988). For the relevant text of the statute, see *supra* note 6.

Note that on January 15, 1992, the Supreme Court issued a final order of deportation for Doherty. *I.N.S. v. Doherty*, 112 S. Ct. 719 (1992). *Certiorari* was dismissed by the Supreme Court for the present case. *Doherty v. Barr*, 112 S. Ct. 1254 (1992).

19. The government of the United Kingdom sought the extradition on the basis of Doherty's conviction in Northern Ireland for "murder, attempted murder, and illegal possession of firearms and ammunition, and for offenses allegedly committed in the course of his escape from prison." *Matter of Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984).

20. Extradition was sought pursuant to 18 U.S.C. § 3184 (1990) and the Treaty of Extradition, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 [hereinafter *Extradition Treaty*].

21. *Doherty v. Thornburgh*, 943 F.2d at 206.

22. *Matter of Doherty*, 599 F. Supp. at 276-77. Article V(1)(c)(i) of the Treaty provides:

(1) Extradition shall not be granted if:

(c)(i) the offense for which extradition is requested is regarded by the requested party as one of political character; . . .

Extradition Treaty, *supra* note 20. The court found that the killing of the British army captain was the result of a gun battle between two armed military units in the course of and in furtherance of the historic effort of the Irish to end British occupation of their country. *Matter of Doherty*, 599 F. Supp. at 273. Note that under an amendment to the extradition treaty, the political offense exception was subsequently eliminated. *Supplementary Extradition Treaty with the United Kingdom*, S. EXEC. REP. 17, 99th Cong., 2d Sess. 1-2 (1986) [hereinafter *Supplementary Extradition Treaty*].

23. The government sought collateral review because the denial of a request for extradition is not appealable. *Matter of Mackin*, 668 F.2d 122 (2d Cir. 1981). The dismissal of this suit was affirmed on appeal, where the court held that "the government has not cited, and we have not been able to find, a single case in which declaratory judgment was used in a manner resembling that which the Government proposes here." *United States v. Doherty*, 786 F.2d 491, 500 (2d Cir. 1986).

24. *Doherty v. Thornburgh*, 943 F.2d at 206. Doherty conceded that he was deport-

land as the destination of his deportation.²⁵ On September 19, 1986, the immigration judge ordered Doherty's deportation to the Republic of Ireland.²⁶ The government appealed this order.²⁷ Before the appeals were final, the Republic of Ireland signed an extradition treaty with the United Kingdom.²⁸ Shortly thereafter, Doherty sought to rescind his request for deportation to Ireland and moved to reopen his deportation proceedings in order to apply for political asylum in the United States.²⁹ Doherty's motion to reopen was ultimately denied in January 1992 by the Supreme Court of the United States.³⁰ He has since been de-

able because he had entered the United States without valid immigration documents. *Doherty v. Thornburgh*, 750 F. Supp. at 133. *See generally* 8 U.S.C. §§ 1251(a)(1), 1182(a)(20)(1988).

25. *Doherty v. Thornburgh*, 943 F.2d at 206. The Immigration and Naturalization Service (INS) objected to this designation on the ground that deporting him to Ireland would be prejudicial to the interests of the United States. The INS received a continuance so that it could consult with senior government officials. *Id.* *See generally* 8 U.S.C. § 1253(a)(1988).

26. *Doherty v. Thornburgh*, 943 F.2d at 207. Immigration Judge Cohen rejected the INS's arguments and ruled that Doherty's deportation to the Republic of Ireland would not be prejudicial to the interests of the United States. *Id.* At this time Doherty filed a petition for a writ of habeas corpus alleging that the INS appeal of Judge Cohen's decision was frivolous and that the government was trying to delay the proceedings in the hope that a new extradition treaty would be approved between the United States and Great Britain which would eliminate the political offense exception retroactively. *Id.* *See also* Brief for Appellee at 11-12, *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991)(No. 91-2044); Supplementary Extradition Treaty, *supra* note 22.

27. On March 11, 1987, the Board of Immigration Appeals (the BIA) affirmed Judge Cohen's order. *Doherty v. Thornburgh*, 943 F.2d at 207. Upon request by the INS, the then-Attorney General Edwin Meese III agreed to review the BIA's decision and in June 1988 reversed the BIA, finding that deportation to Ireland would be prejudicial to U.S. interests. *Id.*

28. The Irish Extradition (European Convention on the Suppression of Terrorism) Act of 1987 (Dec. 1, 1987). Under its terms, Doherty's deportation to Ireland would be the equivalent of his extradition to the United Kingdom.

29. *Doherty v. Thornburgh*, 943 F.2d at 207.

30. *I.N.S. v. Doherty*, 112 S. Ct. 719 (1992). On November 14, 1988, the BIA granted the motion to reopen, concluding that the 1987 Irish Extradition Act was a circumstance that Doherty could not have been expected to anticipate, and would lead to his extradition to the United Kingdom, where he feared persecution. *Id.* at 723. Attorney General Thornburgh reversed this decision after a request by the INS that the decision be certified by him. *Doherty v. Thornburgh* 943 F.2d at 207, 208. The Second Circuit, reviewing Thornburgh's decision and Attorney General Meese's earlier denial of Doherty's deportation to Ireland, *see supra* note 25, affirmed the Meese order but reversed Thornburgh, finding that he "exercised his discretion in denying Doherty's application for reasons that Congress sought to eliminate from asylum cases, and in doing so, he abused his discretion." *Doherty v. United States Dep't of Justice*, I.N.S., 908 F.2d 1108, 1121 (2d Cir. 1990). The Supreme Court reversed the Court of Appeals, finding that it "placed a much too narrow limit on the authority of the Attorney General to deny a motion to reopen deportation proceedings." *I.N.S. v. Doherty*, 112 S. Ct. at 724.

ported to the United Kingdom.³¹

While the extradition and deportation issues were being litigated, Doherty sought to be released on bail. The judge in the extradition proceedings initially denied Doherty's application for bail based on risk of flight.³² Over a year later, however, an immigration judge ordered that he be released on a \$200,000 bond but the Immigration and Naturalization Service (INS) appealed and received an emergency stay of the decision.³³ In March 1985, the Board of Immigration Appeals (BIA) ordered that Doherty be held without bail.³⁴ After Doherty's application for redetermination of bond was denied by the BIA in 1990,³⁵ Doherty filed this action seeking habeas review of the decision.

B. Procedural History

While seeking review of the BIA decision affirming the denial of his application for redetermination of bond,³⁶ Doherty filed a petition for habeas corpus with the federal district court of the Southern District of New York.³⁷ He argued that the unusual length of his confinement violated his substantive due process rights under the Fifth Amendment.³⁸ He also asserted that the three-part test used by the Second Circuit to examine limits on pretrial detention in *United States v. Gonzales Claudio*³⁹ should be applied to his case.⁴⁰ Finally, he claimed that, even if

31. *IRA Ex-Member Doherty Loses 10-Year Battle on Deportation*, WASH. POST, Feb. 20, 1992, at A5.

32. *Doherty v. Thornburgh*, 943 F.2d at 206.

33. *Id.*

34. *Id.* The BIA found that Doherty presented "such a poor bail risk that no amount of bond [would] reasonably assure his presence for future proceedings." *Id.*

35. *Id.* at 208.

36. The BIA found that "a substantial portion of the period of [Doherty's] detention" was attributable to his litigation strategy and that no bond conditions could ensure Doherty's availability for deportation because he continued to present such a great risk of flight. *Doherty v. Thornburgh*, 750 F. Supp. 131, 134 (S.D.N.Y. 1990), *aff'd*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992). In rejecting the due process claim, the BIA found *Gonzales Claudio*, *infra* note 39, "unpersuasive authority as they are criminal cases and relate to pretrial detention." In re Doherty, BIA File No. A26185231 (BIA March 29, 1990) (quoted in Brief for Appellees at 19, *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991) (No. 91-2044), *cert. dismissed*, 112 S. Ct. 1254 (1992)).

37. *Doherty v. Thornburgh*, 943 F.2d at 208.

38. *Doherty v. Thornburgh*, 750 F. Supp. at 131.

39. 806 F.2d 334 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986). See *infra* notes 59-77 and accompanying text.

40. *Doherty v. Thornburgh*, 750 F. Supp. at 136. In the three-part test announced in *Gonzales Claudio*, 806 F.2d at 340, the length of confinement is considered together with the extent to which the government bears responsibility for delays in the proceedings.

the length of his confinement by itself was constitutional, his continued detention violated due process protection under the *Gonzales Claudio* test.⁴¹

The district court ruled that *Gonzales Claudio* was inapposite.⁴² It distinguished detention pending deportation from detention pending criminal proceedings by "the absence of a presumption of innocence in deportation proceedings and the inapplicability of the constitutional and statutory rights to a speedy trial."⁴³ The court concluded that Doherty's detention was constitutional, although it added in dictum that if detention "ceases to serve the Government's legitimate regulatory purpose, continued detention becomes punitive and unconstitutional."⁴⁴

On appeal, Doherty argued that *Gonzales Claudio* was controlling and thus required the conclusion that inordinately long pre-deportation detention is unconstitutional.⁴⁵ The Second Circuit rejected Doherty's argument that *Gonzales Claudio* applied to his case and affirmed the decision of the district court.⁴⁶ While the Second Circuit noted that "aliens do have a substantive due process right to be free of arbitrary confinement pending deportation proceedings," the court concluded that this right is "circumscribed by considerations of the national interest."⁴⁷

In analyzing the circumstances surrounding Doherty's detention, the Second Circuit focused on the discretion of the Attorney General, in whom Congress has vested broad power re-

and the strength of the evidence of risk of flight. See *infra* notes 59-77 and accompanying text.

41. Doherty v. Thornburgh, 750 F. Supp. at 136.

42. *Id.*

43. *Id.* The court relied upon *Dor v. District Director*, I.N.S., 891 F.2d 997, 1003 (2d Cir. 1989), which held that *Gonzales Claudio* was controlling only for criminal defendants detained for a prolonged period without bail before any trial. See *infra* notes 82-89 and accompanying text.

Despite rejecting *Gonzales Claudio*, the court proceeded to apply the test anyway to demonstrate the constitutionality of Doherty's detention were the test applicable to deportable aliens: "The strength of the evidence of risk of flight, combined with petitioner's failure to establish that the Government has improperly delayed deportation proceedings, shows that petitioner's detention continues to serve the valid regulatory purpose of keeping him available for deportation." Doherty v. Thornburgh, 750 F. Supp. at 139.

44. Doherty v. Thornburgh, 750 F. Supp. at 137.

45. Doherty v. Thornburgh, 943 F.2d 204, 209 (2d Cir. 1991), cert. dismissed, 112 S. Ct. 1254 (1992).

46. *Id.* In the course of its analysis, the court, however, addressed each of the factors that were rejected with the *Gonzales Claudio* test. *Id.*

47. *Id.*

garding a deportable alien's detention.⁴⁸ The court found that "[b]ecause the infringement upon Doherty's liberty interest results from a proper exercise of discretion[,] . . . the prolonged detention in this case is not conduct that goes beyond the range of government activity permitted by the Constitution."⁴⁹ The court noted the government's interests in carrying out its responsibilities over immigration matters and Doherty's threat to national security as factors which supported the Attorney General's broad use of discretion.⁵⁰ In justifying its conclusion, the court also analyzed the causes of Doherty's lengthy detention, finding that Doherty had been largely at fault for the delays in litigation and that he had not demonstrated "the invidious purpose, bad faith or arbitrariness [on the part of the government] necessary to make out a denial of substantive due process."⁵¹

The dissent argued that "[i]t is fundamental to our conception of liberty that an individual who is not accused or convicted of a crime in this country may not be held indefinitely by the State, regardless of his or her immigration status."⁵² Relying on the fairness principle that the Due Process Clause was designed to protect, the dissent found it shocking that the court was allowing "the government to indefinitely pursue a litigation strategy, which was essentially designed to circumvent an extradition decision, at the expense of an individual's right to liberty."⁵³

III. ANALYSIS

Joseph Doherty's eight-year detention highlights the need for a principled substantive due process analysis of the constitutional rights afforded to aliens in deportation cases. Substantive due process derives from the Fifth Amendment's guarantee that

48. *Id.* at 210.

49. *Id.* at 211.

50. *Id.* The court based its finding that Doherty posed a general threat to national security on his PIRA affiliation. *See also* Doherty v. United States Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985) ("Given Doherty's overseas activities, the FBI could reasonably have concluded that Doherty constituted a threat to national security."). Note, however, that Doherty's application for bond was denied solely on the grounds of his risk of flight and the issue of his danger to society was not before the court. *See supra* note 32 and accompanying text; Reply Brief for Appellant at 2, Doherty v. Thornburgh, 943 F.2d 204 (2d Cir. 1991)(No. 91-2044), *cert. dismissed*, 112 S. Ct. 1254 (1992).

51. Doherty v. Thornburgh, 943 F.2d 204, 212 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

52. *Id.* at 213 (Altimari, J., dissenting).

53. *Id.*

"[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."⁵⁴ It has been interpreted as "prevent[ing] the government from engaging in conduct that 'shocks the conscience,' or interfer[ing] with rights 'implicit in the concept of ordered liberty.'"⁵⁵ One situation where this constitutional protection has been invoked is when the government detains an individual for a lengthy period without any criminal conviction.⁵⁶

While pretrial detention has been considered a permissible government regulatory measure,⁵⁷ many courts have recognized that at some point the length of such detention unjustly impinges upon an individual's constitutional rights.⁵⁸ Detention pending deportation is an analogous example of the government detaining an individual who has not been convicted of a crime as a regulatory measure. Because detention pending deportation is so similar to pretrial detention, Doherty's substantive due process claim requires that his detention must also be balanced against the constitutional protection of individual freedom. Only when such a principled analysis is applied will the constitutional rights of deportable aliens be given their proper regard.

A. *The Gonzales Claudio Test*

In *United States v. Gonzales Claudio*, the Second Circuit announced a test to be used in determining whether an individual's pretrial detention has exceeded its constitutional limits.⁵⁹ While awaiting trial, the appellants⁶⁰ had been held without bail

54. U.S. CONST. amend. V.

55. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

56. See, e.g., *United States v. Jackson*, 823 F.2d 4, 7 (2d Cir. 1987); *United States v. Gonzales Claudio*, 806 F.2d 334 (2d Cir.), cert. dismissed, 479 U.S. 978 (1986).

57. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (holding that pretrial detention is constitutional so long as the restriction on liberty does not constitute punishment as opposed to a permissible regulation).

58. See *Gonzales Claudio*, 806 F.2d at 339 ("The Government does not dispute that at some point and under some circumstances, the duration of pretrial detention becomes unconstitutional."); *United States v. Zannino*, 798 F.2d 544, 547 (1st Cir. 1986); *United States v. Melendez-Carrion*, 790 F.2d 984, 1008 (2d Cir. 1986) (Feinberg, C.J., concurring); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986); *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), appeal sub nom. *United States v. Cheeseman*, 783 F.2d 38 (2d Cir. 1986).

59. *Gonzales Claudio*, 806 F.2d at 340-43.

60. Appellants had been indicted for the robbery of a bank. The district court found that they were salaried members of a paramilitary, terrorist organization dedicated to achieving independence for Puerto Rico. Responsibility for the robbery had been

for fourteen months based on the risk of their flight.⁶¹ The court found their detention unconstitutional because the risk of their flight was outweighed by the length of their detention and the government's responsibility for the delay.⁶² By developing a test which inquires into the length of detention, the government's responsibility for delay, and the defendants' risk of flight, the court provided a proper balance between the government's interest in efficiently enforcing its laws against the individual's liberty interest.⁶³

In announcing its test, the court stated that the due process limit on the duration of preventive detention must be assessed on a case-by-case basis.⁶⁴ The length of an individual's detention was found to be the central focus of the court's substantive due process inquiry.⁶⁵ However, the court reasoned that a proper due process analysis requires additional factors to be considered, even though "at some point the length of confinement would exceed constitutional limits regardless of the circumstances."⁶⁶ Thus, the court found it "more consonant with due process jurisprudence" to also consider the extent to which the government bears responsibility for the delay that has ensued and the strength of the evidence indicating risk of flight.⁶⁷

The court first inquired into the duration of the defendants' confinement. Using the statutory period specified in the Speedy Trial Act⁶⁸ as a point of reference, the court compared the de-

claimed by this organization. *Id.* at 336-37.

61. *Id.* at 335. The court did not reach the issue of the proper substantive due process analysis for when an individual has been detained on the ground of dangerousness. In a related case also involving appellants, the concurring judge wrote that detention lasting eight months was unconstitutional punishment when based on the ground of dangerousness, but was within constitutional limits when based on the risk of flight. *Melendez-Carrion*, 790 F.2d at 1009 (Feinberg, J., concurring).

Doherty has also been detained solely on risk of flight grounds. *Doherty v. Thornburgh*, 943 F.2d 204, 206 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992). The issue of the constitutionality of the detention of a deportable alien based on dangerousness will have to wait until it is before the courts.

62. *Gonzales Claudio*, 806 F.2d at 343.

63. *Id.*

64. *Id.* at 340.

65. *Id.*

66. *Id.*

67. *Id.*

68. 18 U.S.C. § 3164(b)(1988). The statute provides: "The trial of [pretrial detainees and persons who have been designated as being of high risk] shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government." *Id.*

fendants' fourteen month incarceration with Congress' specified preference for a detainee's trial to begin within ninety days after the start of his detention.⁶⁹ The court found that "[d]etention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process."⁷⁰

The Second Circuit also inquired into the extent to which the government bore responsibility for the length of defendants' confinement. Noting the complexity of the case and volume of evidentiary material, the court concluded that the prosecution was responsible for a significant amount of the delay because of its failure to expeditiously provide the materials requested by the defendants' counsel.⁷¹ A determination of the precise amount of delay attributable to the government was not important to the court's inquiry.⁷²

Finally, the court analyzed the danger that the defendants would not appear for their trial. The court found that a standard of appellate review broader than the customary "clearly erroneous" standard was appropriate for this type of constitutional inquiry.⁷³ Thus, when analyzing the constitutionality of pretrial detention, the absence of any prior acts which specifically indicate a likelihood that the defendant will flee would be significant.⁷⁴ Because there had been no specific finding of any prior acts which were evidence of defendants' risk of flight, the risk was determined to be insufficient to justify continued detention in light of the length of the detention and the government's responsibility for the delay.⁷⁵

69. *Gonzales Claudio*, 806 F.2d at 340-41.

70. *Id.* at 341.

71. *Id.* at 342. For example, the government's translation of the audiotapes obtained by its wiretapping was not completed until nine months after defendants were incarcerated. Additionally, the translation of seized documents took more than a year and the existence of videotapes was not made known to defendants until ten months after their detention began. *Id.*

72. *Id.*

73. *Id.* at 343. In *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986), a companion case to *Gonzales Claudio* involving the same defendants and others, the court had applied the clearly erroneous standard normally used by the court in its appellate function to the district judge's risk of flight determination in upholding his factual finding. In *Gonzales Claudio*, however, the court determined that the constitutional inquiry entitled it to a broader standard of review. *Gonzales Claudio*, 806 F.2d at 343. See also *United States v. Zannino*, 798 F.2d 544, 546 (1st Cir. 1986).

74. *Gonzales Claudio*, 806 F.2d at 343.

75. *Id.* The court noted that the evidence which served as the basis for the district court's decision, that defendants were involved with armed robbery and with a terrorist

Finally, the court acknowledged that "the enforcement of due process limits upon the duration of preventative detention creates the risk that a person accused of a crime may avoid a trial that might result in conviction and punishment."⁷⁶ However, finding that this serious risk was outweighed by the lengthy detention of defendants who had not yet been convicted of a crime, the court vacated the detention order of the district court.⁷⁷

In *United States v. Ojeda Rios*,⁷⁸ the Second Circuit later clarified the reach of the *Gonzales Claudio* test by finding the appellant's 32 month pretrial detention to be unconstitutional.⁷⁹ The court concluded that even with strong evidence of appellant's risk of flight, detention which was so lengthy and would not be ending soon could not be tolerated under the Due Process Clause.⁸⁰ Thus, *Ojeda Rios* indicated that with increasingly longer periods of pretrial detention the risk of flight by the detainees becomes less important.⁸¹

B. The Dor Decision

In *Dor v. District Director*,⁸² the Second Circuit determined that the *Gonzales Claudio* analysis did not apply in determining the constitutionality of the detention of deportable aliens. In *Dor*, petitioner was a citizen of Haiti, who entered the United States at the age of twelve and was convicted of manslaughter six years later.⁸³ After serving his prison sentence, he was released into the custody of the INS, where he remained during

organization, provided a reasonable basis for its initial decision. *Id.*

76. *Id.* In reaching this conclusion the court noted that "the enforcement of all constitutional restraints upon government in its efforts to administer the criminal law entails risks." *Id.*

77. *Id.*

78. 846 F.2d 167 (2d Cir. 1988). This case involved another individual allegedly involved in the same bank robbery as the defendants in *Gonzales Claudio*, 806 F.2d at 334. Ojeda Rios had been held without bail on the grounds of both dangerousness and risk of flight. *Ojeda Rios*, 846 F.2d at 168.

79. *Ojeda Rios*, 846 F.2d at 168-69.

80. *Id.*

81. The Second Circuit has revisited the *Gonzales Claudio* test in another related case involving defendants who were accused of being part of the same bank robbery. In *United States v. Melendez-Carrion*, the court found that appellants' nineteen month detention did not violate their due process rights due mainly to the strong evidence of their risk of flight. 820 F.2d 56, 61 (2d Cir. 1988).

82. 891 F.2d 997, 1003 (2d Cir. 1989).

83. *Id.* at 999.

his fight against deportation.⁸⁴ In reviewing the district court's denial of habeas corpus relief, the Second Circuit rejected Dor's argument that his continued detention of more than five years was a denial of due process.⁸⁵ After finding *Gonzales Claudio* inapplicable, the court determined that Dor's own responsibility for the delay in his detention was the dispositive factor in his due process claim.⁸⁶ By focusing on Dor's exhaustion of his judicial remedies, the court in fact applied part of the analysis that it had previously rejected in distinguishing *Gonzales Claudio*.⁸⁷

Ultimately, the Second Circuit rejected the *Gonzales Claudio* analysis in *Dor* because it distinguished the *Gonzales Claudio* detention as criminal in nature.⁸⁸ The court erred in reaching that conclusion. There is no reason to discard the constitutional analysis used in *Gonzales Claudio* solely because of the distinction between a criminal pretrial detainee and a deportable alien. In the past, courts have found the similarities between the two types of detention to be quite useful because both are temporary, regulatory procedures that serve to enable the government to carry out its laws.⁸⁹

Though the distinction made in *Dor* was based on the finding that "the full trappings of legal protections that are accorded to criminal defendants are not necessarily constitutionally required in deportation proceedings,"⁹⁰ the court could not have

84. *Id.*

85. *Id.* at 1003.

86. *Id.* The court characterized Dor's responsibility for the delay as "repeated, unsuccessful appeals of various administrative decisions." *Id.*

87. The court proceeded to quote *Gonzales Claudio* after rejecting it in the previous paragraph. The court wrote: "[Dor] comes perilously close to *Gonzales Claudio*'s admonition that '[parties] cannot litigate pretrial matters to the ultimate degree and then rely on the extra time attributable to their . . . practice to claim that the duration of pretrial detention violates due process.'" *Id.* (quoting *United States v. Gonzales Claudio*, 806 F.2d 334, 341 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986)).

88. *Id.* at 1003.

89. See, e.g., *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981) ("Detention pending deportation seems properly analogized to incarceration pending trial."); *Leader v. Blackman*, 744 F. Supp. 500, 507 n.11 (S.D.N.Y. 1990) ("[W]e find the analogy to pretrial detention appropriate, at least for the purposes of defining the proper scope of inquiry.").

90. *Dor v. District Director, I.N.S.*, 891 F.2d 997, 1003 (2d Cir. 1989). In the district court's opinion in *Doherty*, *Gonzales Claudio* was found not to be controlling in the deportation context "because of the absence of a presumption of innocence in deportation proceedings and the inapplicability of the constitutional and statutory rights to a speedy trial." *Doherty v. Thornburgh*, 750 F. Supp. 131, 136 (S.D.N.Y. 1990), *aff'd*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992). This distinction is indeterminate considering that "presumption of innocence" and "speedy trial" rights are

meant that the Fifth Amendment is not equally applicable to deportable aliens. The Constitution does not supply a different degree of due process protection to different categories of persons;⁹¹ such distinctions simply do not appear in its text. Moreover, the Supreme Court has interpreted the Fifth Amendment as applicable to deportable aliens.⁹²

With no sound reasoning behind the distinction made in *Dor*, the analysis of an alien's substantive due process claim requires the same analysis that would be used for a citizen. Although the government has an additional interest when an individual is detained in the context of immigration proceedings,⁹³ this distinction may be accommodated by simply incorporating this additional interest — deference for foreign policy — into the *Gonzales Claudio* balancing test. There is no reason to abandon the principled inquiry into the factors that were enunciated in *Gonzales Claudio* simply because of the citizenship and immigration status of the individual being detained.

C. *Elements of Gonzales Claudio in Immigration Case Law*

In those few cases in which the substantive due process rights of aliens in detention have been analyzed, the courts have inquired into factors similar to those used for pretrial detainees in *Gonzales Claudio*. Without relying on any enunciated test that is comparable to that of the Second Circuit, federal courts have still found the length of the alien's detention, the responsibility for the delay, and the risk of flight to be within the proper scope of their inquiry. That the same factors have been used by other courts in the due process analysis of such cases suggests that the Second Circuit improperly rejected the *Gonzales Claudio* test in *Dor* and *Doherty v. Thornburgh*.

The challenges to the prolonged detention of the Mariel

solely procedural. The challenge to the detention in this case, however, is substantive. The implication that these procedural rights are necessary in order for the *Gonzales Claudio* analysis to apply leads to absurd results: if Doherty also had committed a crime, then would he have had greater due process rights merely because he had the benefit of the "presumption of innocence" and a "speedy trial"?

91. A person can be categorized as a citizen, or deportable, excludable, or resident alien.

92. See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth A]mendment").

93. See *infra* notes 134-37 and accompanying text.

Cubans⁹⁴ provide an analogous context in which to explore the proper analysis to be used for the detention of aliens such as Joseph Doherty.⁹⁵ In *Rodriguez-Fernandez v. Wilkinson*,⁹⁶ a case involving a Mariel Cuban detainee, the Tenth Circuit addressed the constitutionality of the lengthy detention of aliens. Even though the detainee in this case was an excludable alien, the court noted that "detention pending deportation seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus, justifiable only as a necessary, temporary measure."⁹⁷ The Tenth Circuit apparently did not see the distinction that the Second Circuit found be-

94. In the spring of 1980, 125,000 Cuban immigrants sailed from Mariel Harbor in Cuba to the shores of the United States in response to statements by the President of the United States that the United States would receive "tens of thousands" of Cubans with "an open heart and open arms." Mark D. Kemple, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans: Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1735 (1989). Because most of these aliens lacked proper entry documents, they were "excludable" under the provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1227(a)(1988) and were thus denied formal admission to the United States. Kemple, *supra*, at 1736. While the Act requires that the excluded aliens be returned to where they came from, Cuba refused to take them back. The Attorney General, acting through the INS, detained the aliens at camps throughout the United States, and thereafter paroled many of them. Kemple, *supra*, at 1736.

95. The court in *Doherty v. Thornburgh* noted the distinction between "excludable" and "deportable" aliens, distinguishing Joseph Doherty from the Mariel Cubans, who were excludable. *Doherty v. Thornburgh*, 943 F.2d 204, 208 n.1 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992). An alien seeking admission into the United States has no inherent right of entry and, therefore, does not receive the due process protection of other individuals in the country. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). *See also* *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (no constitutional right to enter in substantive due process challenge).

Many argue that this distinction is a legal fiction, which gives certain aliens in the United States less legal protection simply because they have not officially "entered" the country, having been apprehended at the border. *See* Kemple, *supra* note 94, at 1735; *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) (no distinction can be drawn in application of rules between an alien who is regarded as standing at the border and one who is a resident of the United States).

For the purposes of this analysis, the immigration status of the alien is irrelevant. These cases merely point to the kind of factors to consider when a detainee is involved in an immigration procedure. The test that is being developed, however, will only be applicable to deportable aliens because the government has slightly different interests when an alien is excludable, and the time frame in which an excludable alien is to be excluded is different and governed by separate statutes. For an examination of the due process rights of excludable aliens, see Ethan A. Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 YALE L.J. 639 (1989).

96. 654 F.2d 1382, 1387 (10th Cir. 1981).

97. *Id.*

tween detainees who are awaiting trial and those who are awaiting deportation.

Rodriguez-Fernandez, like Doherty, had committed no offense against the United States, yet he had been confined in a maximum security federal prison for more than a year.⁹⁸ However, because he had not yet entered the country, Rodriguez-Fernandez was found excludable.⁹⁹ The Tenth Circuit nonetheless ordered his release, holding that the Attorney General lacked the authority to detain excludable aliens beyond "a reasonable period of negotiations for their return to the country of origin or to the transporter that brought them here."¹⁰⁰

In analyzing Rodriguez-Fernandez's due process rights,¹⁰¹ the court focused on the length of his detention, finding that imprisonment for an indefinite period of time was impermissible when it continued beyond reasonable efforts to expel the alien.¹⁰² The court relied on precedent which established that detention becomes imprisonment when deportable or excludable aliens are in custody for more than a few months.¹⁰³ The focus of the court's constitutional inquiry was thus centered on the length of the detention of an alien who was guilty of no crime in the United States. In *Rodriguez-Fernandez*, that detention was too long.

The First Circuit has looked at more than the length of detention in analyzing the constitutional challenge to the detention of excludable aliens. In *Amanullah v. Nelson*,¹⁰⁴ the court found that the government's lack of responsibility for the delay was dispositive of the constitutionality of the detention of four Afghanistans who were being detained by the INS pending final resolution of the exclusion proceedings against them.¹⁰⁵ The

98. *Id.* at 1385.

99. *Id.* at 1384. His exclusion was based on his criminal record and lack of immigration documents. *Id.*

100. *Id.* at 1389.

101. The court disposed of the appeal by construing the exclusion statutes narrowly to require Rodriguez-Fernandez's release, but found it important to address the constitutional issues. *Id.* at 1386.

102. *Id.* at 1387.

103. See *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925) ("There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a crime."). This case was decided before the statutory limits placed upon the detention of aliens by the subsequent Immigration and Nationality Acts.

104. 811 F.2d 1 (1st Cir. 1987).

105. *Id.* at 9.

court found that "there is no suggestion of unwarranted governmental footdragging in these cases[,] prompt attention hav[ing] been paid to the administrative aspects of exclusion and asylum." Thus the discretionary detention was found to be constitutional because it "ha[d] not been unnecessarily prolonged."¹⁰⁶ Acknowledging that the length of detention was also an important factor to consider in this due process inquiry, the court distinguished *Rodriguez-Fernandez* because the Afghanistanis' exclusion and asylum proceedings were still pending.¹⁰⁷

In *Amanullah* and *Rodriguez-Fernandez*, the courts addressed two elements of the test for pretrial detainees in analyzing the constitutionality of lengthy detention in the immigration context.¹⁰⁸ While not explicated, the fear that the aliens might never be deported is an additional, underlying consideration in each of these cases which reflects a concern that aliens will abscond upon release.¹⁰⁹ The approach these courts have taken in their constitutional inquiries demonstrates the usefulness of the *Gonzales Claudio* factors in the immigration context.¹¹⁰ Thus,

106. *Id.*

107. *Id.* While petitioners in *Amanullah* had also been detained for over a year, in *Rodriguez-Fernandez* a final deportation order had already been entered against the alien. *Id.* at 9 n.4.

108. Recall that in *Dor v. District Director*, discussed *supra* at notes 82-89 and accompanying text, the court relied upon appellant's significant responsibility for the delay of his detention. 891 F.2d 997, 1003 (2d Cir. 1989).

109. See, e.g., *Amanullah*, 811 F.2d at 11 ("freeing [the Cubans] from detention would . . . have created an ever-increasing law enforcement problem").

110. In the immigration context, a consideration of national security has also factored into the constitutionality of the detention of aliens. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207 (1953), for example, the confinement of an excluded alien on Ellis Island for twenty-one months was justified on the grounds that he was excluded as a security risk. Justice Jackson dissented in this case but noted in his constitutional analysis that "substantively, due process of law . . . tolerates all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means." *Id.* at 222 (Jackson, J., dissenting).

When an alien is detained as a threat to national security, the court may need to use a different constitutional analysis than in the context of immigration. Since *Gonzales Claudio* was decided, the Second Circuit has expressly limited the test to reviewing the constitutionality of continued detention based on risk-of-flight grounds. *United States v. Melendez-Carrion*, 820 F.2d 56, 58 (2d Cir. 1987). In *Doherty v. Thornburgh*, dangerousness was not the basis for detention. While the Second Circuit noted that Doherty "may constitute a more general threat to national security," 943 F.2d 204, 211 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992), his detention was based solely on his risk of flight and the dangerousness issue was not before the court. When the issue arises, a proper analysis will be developed factoring in the national security risk. The national security risk discussed in *Mezei*, *supra*, was based on the fear of the spread of communism, an element of the political climate at the time the case was decided. See 345 U.S. at 207.

the *Gonzales Claudio* test should be applicable to all substantive due process challenges to the incarceration of any individual who has not been convicted of a crime.

D. A *Gonzales Claudio* Test for Immigration Matters

Once it has been determined that the framework of the *Gonzales Claudio* test is appropriate for all constitutional challenges to prolonged government restraint, the analysis must be tailored to fit the context of the particular detention. In the immigration context, the government has additional interests which are absent from pretrial detention in criminal law.¹¹¹ In developing an analysis for detention in the immigration context, the same factors prescribed in *Gonzales Claudio* will be used and adjusted to take into account the additional government interests involved.¹¹²

1. Aliens' Interests

Like all pretrial detainees, aliens have a liberty interest to be free of prolonged restraint.¹¹³ The Fifth Amendment of the Constitution makes no distinction between aliens and citizens in protecting all persons within the jurisdiction of the United States from deprivation of life, liberty or property without due process of law.¹¹⁴ This protection even extends to those unlawfully present in the United States.¹¹⁵ Thus, there is no difference between the liberty interests of illegal aliens and United States citizens.

The length of detention is a significant factor in considering whether the substantive due process rights of a deportable alien have been violated.¹¹⁶ While Congress has required that deportation be pursued "with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of

111. See *infra* notes 134-37 and accompanying text.

112. The test must embody a proper balancing of the government's interest in immigration matters and the individual's liberty interest in determining whether an alien's substantive due process rights have been violated.

113. See *Fernandez-Santander v. Thornburgh*, 751 F. Supp. 1007, 1011 (D. Me. 1990), *vacated and remanded*, 930 F.2d 906 (1st Cir. 1991) ("alien has a strong interest in liberty").

114. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). See also *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

115. *Mathews*, 426 U.S. at 77.

116. See *supra* note 65 and accompanying text.

any alien,"¹¹⁷ the Attorney General has a statutorily defined six-month period in which to effectuate the deportation of an alien once a final judgment has been rendered.¹¹⁸ Thus, the longer the delay in the alien's receipt of a final judgment, the greater the deprivation of liberty.

With a statutory limit on the amount of time an alien may be held, the detention can only be prolonged as a result of appeals or delay caused by either the government or the alien. Thus, in analyzing a lengthy detention, it is important to note the extent to which the alien is responsible for her own continued detention.¹¹⁹ For example, if lengthy detention is the result of an alien's repeated use of appellate review to avoid deportation, then it is less likely that the government will be found to have deprived the detainee of her liberty in violation of the Fifth Amendment.¹²⁰

In giving weight to a deportable alien's liberty interest, the length of the detention and the responsibility for the delay are within the proper scope of inquiry just as they are in the *Gonzales Claudio* context of pretrial detention. A principled constitutional analysis must also give sufficient weight to the government's interests.

2. The Government's Interests

An alien's right to liberty during the course of deportation proceedings must be circumscribed by the relevant interests of the government.¹²¹ While all individuals in the United States are protected by the Fifth Amendment of the Constitution, a deportable alien does not receive the same degree of protection as an American citizen because the weight of the government's in-

117. 8 U.S.C. §§ 1252(a)(1), 1252(c) (1988).

118. 8 U.S.C. § 1252(c)(1988). *See supra* note 5 for text of statute. Once the six months have passed, the alien must be released until the INS can execute the deportation. *See Dalis v. Brady*, 766 F. Supp. 901, 905 (D. Colo. 1991); *Castillo-Gradis v. Turnage*, 752 F. Supp. 937, 941 (S.D. Ca. 1990).

Congress' unspecified limit on detention prior to a final judgment of deportation provides a difficult point of reference for judging the excessiveness of the detention. Compare the use of the Speedy Trial Act as a point of reference for pretrial detainees in *United States v. Gonzales Claudio*, 806 F.2d 334, 340-41 (2d Cir. 1986). *See supra* notes 68-70 and accompanying text.

119. *See Gonzales Claudio*, 806 F.2d at 340.

120. *See, e.g., Dor v. District Director*, 891 F.2d 997, 1003 (2d Cir. 1989).

121. *Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

terests is heightened in the immigration context.¹²² By scrutinizing the government's interests in detaining an alien the court clarifies the degree to which an alien's liberty interest may be qualified.

It is well established that control over matters of immigration and naturalization is the "inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."¹²³ Under the United States Constitution, such control over the borders is vested in Congress.¹²⁴ Congress has charged the Attorney General with "the administration and enforcement" of the immigration laws of the United States,¹²⁵ and specifically has vested in that office the discretion to detain aliens during deportation proceedings.¹²⁶ Holding an alien in detention without bail is only justified, however, when it is in the public interest¹²⁷ or if the alien is likely to abscond.¹²⁸

Thus, a primary purpose of detention is to ensure that the alien will be available if he or she is determined to be deportable.¹²⁹ While the traditional threat of flight¹³⁰ is not a concern in the context of immigration since expulsion is exactly what is sought by the government, the threat remains that an alien sub-

122. See, e.g., *Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-90 (1952).

123. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

124. U.S. CONST. art. I, § 8, cl. 4.

125. 8 U.S.C. § 1103(a) (1988).

126. 8 U.S.C. § 1252(a), (c) (1988). The Attorney General has delegated this power to the INS. See *United States ex rel. Barbour v. District Attorney*, 491 F.2d 573, 577 n.4 (5th Cir.), cert. denied, 419 U.S. 873 (1974); *O'Rourke v. Warden*, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982).

127. In carrying out the immigration laws of the United States, it is well established that the government has the power to detain an alien on grounds of national security. See *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of th[e] deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings."). Congress has recognized that any hostility on the part of individuals in the United States towards a friendly nation may threaten national security even though individual American citizens are not directly injured. See 18 U.S.C. §§ 951-962 (1988). Detention on the basis of national security is not involved in these cases.

128. 8 U.S.C. § 1252(a) (1988). See also GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 229 (1978).

129. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *Leader v. Blackman*, 744 F. Supp. 500, 507 (S.D.N.Y. 1990).

130. Under The Bail Reform Act of 1984, "[t]he judicial officer shall order the pre-trial release of the person . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required" 18 U.S.C. § 3142(b) (1988).

ject to deportation will abscond.¹³¹ By denying bail, the government is preserving its ability to carry out its responsibilities over immigration matters.¹³² This interest parallels the government's interest in enforcing its criminal laws through pretrial detention. Therefore, the risk-of-flight prong of the *Gonzales Claudio* test is equally appropriate in the immigration context as a means of balancing the government's interests in enforcing its laws and specifically in executing deportation.¹³³

The federal government has an additional interest, however, in detaining a deportable alien which is not present in pretrial detention. In the immigration context, the government's decision whether to detain or release an individual may have a direct impact on the nation's foreign policy.¹³⁴ For example, as in *Doherty's* case, where an alien has escaped punishment for a crime committed in a friendly foreign nation, there are political concerns involved which reflect the United States' relations with the United Kingdom.¹³⁵ The implications of the release of a pretrial detainee who is a United States citizen, on the other hand, will not affect the United States' relations with foreign governments.¹³⁶ In the immigration context, therefore, more deference must be given to the government's bail decision in light of its special role in matters of foreign policy.¹³⁷

131. *Leader*, 744 F. Supp. at 507.

132. *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

133. Up to this point, all the interests involved in the detention of a deportable alien have been parallel to the interests involved in pretrial detention; thus, each element of the *Gonzales Claudio* test has been found to be relevant in the immigration context. At this point, however, one more element of the government's interests must be taken into account which is not present in the analysis of pretrial detention.

134. See *I.N.S. v. Abudu*, 485 U.S. 94, 110 (1988) ("I.N.S. officials must exercise especially sensitive political functions that implicate questions of foreign relations"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations.>").

135. See, e.g., Brief for Appellee, *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991) (No. 91-2044), *cert. dismissed*, 112 S. Ct. 1254 (1992).

136. This is the point that distinguishes *Doherty v. Thornburgh* from *Gonzales Claudio*. Both cases involved alleged members of terrorist organizations who were being detained while they were involved in legal proceedings. However, in *Doherty*, there were international repercussions present in the release of Joseph Doherty. Domestically, the release of Doherty is just as risky as the release of *Gonzales Claudio*.

137. See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("Since decisions in [immigration] matters may implicate our relations with foreign powers . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."); *Harisiades*, 342 U.S. at 589 ("[Foreign relations] are so exclusively

By using the *Gonzales Claudio* test to analyze the constitutionality of detention in the context of immigration, the same risk-of-flight concerns of the government are sufficiently represented. The government's additional interest in foreign policy is the only factor absent from the analysis used for pretrial detainees and may weigh against the release of the alien.¹³⁸ Therefore the *Gonzales Claudio* test must be adjusted only slightly to accommodate the deference given to the government's decision to detain the alien in light of its greater interests in the immigration context.¹³⁹

E. Applying the Test to Doherty

A proper constitutional analysis of Doherty's detention requires the application of a modified *Gonzales Claudio* analysis that responds to the immigration law context rather than the Second Circuit's cursory assessment of the discretion exercised by the Attorney General. As in the test used for pretrial detention, a court must inquire into the length of the alien's detention, the government's responsibility for delay, and the likelihood that the alien will abscond. Additionally, a court has to consider the government's foreign policy interest and may afford greater weight and deference to the government's decision than it would in the context of pretrial detention.

Looking first at the length of Joseph Doherty's detention — the prime indicator of the infringement on his liberty interest¹⁴⁰ — it is clear that his confinement for over eight years is excessive. Aside from the Mariel Cubans,¹⁴¹ Mr. Doherty has been

entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”).

138. This should not be given so much weight as to render the rest of the analysis meaningless. The whole premise of having a principled constitutional analysis is to avoid the presence of unfettered governmental discretion solely because the people being detained are not U.S. citizens.

139. This inquiry may have to be very fact-specific. While it is not the courts' job to second-guess foreign policy decisions of the executive branch of the government, it does not seem appropriate for the Attorney General to rely on the foreign policy prong of the test in cases where it seems unlikely that release will arise to an international affront to another government.

140. See *supra* note 65 and accompanying text.

141. Besides being distinguishable because of their status as excludable aliens, see *supra* note 95, the Mariel Cubans are also distinguishable because they had never consented to deportation. Doherty, on the other hand, consented to deportation at one point, only to have the government decline to execute the order. See *supra* notes 24-27 and accompanying text.

held longer than any individual in either a federal criminal proceeding or in a deportation proceeding.¹⁴² Though the district court recognized that "no case has come to [its] attention in which a deportable alien has been in custody as long as Doherty,"¹⁴³ it assessed the length of detention by comparison to the Second Circuit's acceptance of the five-year detention in *Dor v. District Director*.¹⁴⁴ Without even inquiring into the factual difference between the two cases, the court found Doherty's three extra years of detention to be of little or no consequence.

The length of Doherty's detention should also be compared to the statutory limit on the detention of deportable aliens prescribed by Congress.¹⁴⁵ While the district court dismissed the argument that eight years of detention is a far cry from the statutorily prescribed six-month limit within which the Attorney General must deport an alien after the entry of a final order of deportation,¹⁴⁶ the six-month figure is indicative of Congress' judgment of a reasonable time within which a deportation should be effectuated. Finally, as suggested by *Gonzales Claudio*, the fact that Doherty's detention is scheduled to last considerably longer also "points strongly to a denial of due process."¹⁴⁷ Doherty's undeniably lengthy detention, however, must still be considered in light of the other important factors.

It is difficult to assess the government's responsibility for delay in lengthy and complex litigation such as Doherty's. The district court attempted to divide up the periods of detention according to who was responsible for the delay during each pe-

142. See, e.g., *Dor v. District Director*, 891 F.2d 997 (2d Cir. 1989) (five years); *United States v. Ojeda-Rios*, 846 F.2d 167 (2d Cir. 1988) (thirty-two months); *United States v. Melendez Carrion*, 820 F.2d 56 (2d Cir. 1987) (nineteen months); *United States v. Gonzales Claudio*, 806 F.2d 334 (2d Cir. 1986) (fourteen months).

143. *Doherty v. Thornburgh*, 750 F. Supp. 131, 137 (S.D.N.Y. 1990), *aff'd*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

144. *Id.* at 137. See *supra* notes 82-87 and accompanying text.

145. See *supra* notes 68-69 and accompanying text.

146. *Doherty v. Thornburgh*, 750 F. Supp. at 137. The court stated that "Congress did not specify a specific time limit for detention pending deportation." *Id.* After quoting the statute's "reasonable dispatch" language, see *supra* notes 117-18 and accompanying text, and relegating the six-month limit to a footnote, the court does not even bother to proceed with any sort of analysis of the length of time. *Id.* Was the court suggesting that there are no limits on the Attorney General's obligation to pursue deportation with "such reasonable dispatch?"

147. See *supra* notes 58-59 and accompanying text. The length of detention can be analyzed in the same way as in *Gonzales Claudio* because there is no difference in the liberty interests. Only the government's interests are different in the immigration context. See *supra* note 70 and accompanying text.

riod.¹⁴⁸ Though this analysis was affirmed by the Second Circuit,¹⁴⁹ a more realistic conclusion was articulated by Judge Altimari in his dissent:

"Both the government and Doherty point an accusing finger at the other as they assess blame for the length of Doherty's incarceration. After eight years, the parallel rights so freely granted have become so intertwined that we are unable to conclude whether one party or another is responsible for the extended confinement. This cannot mean, however, that so long as the parties in the context of this case assert their respective rights in good faith — which necessarily results in delay — the initial detention may be continued ad infinitum."¹⁵⁰

This conclusion appears to present the fairest interpretation of this protracted litigation. When two parties are equally exercising their rights to achieve a certain result, it is unfair to find only one of these parties blameworthy for its actions.¹⁵¹ Thus, when neither or both of the parties are deemed to be blameworthy for the delay, the inquiry is moot.

The government's strongest argument for the continued detention of Doherty was the risk that he would abscond. The district court concluded that "it is difficult to imagine circumstances which would present a greater likelihood that petitioner,

148. *Doherty v. Thornburgh*, 750 F. Supp. at 138-39. After a lengthy analysis which addresses each delay in the proceedings, the court concluded:

With the possible exception of the two-month period during which the Government sought reconsideration from the BIA because the Government's evidence had been inadvertently delayed, the periods which petitioner seeks to attribute to the Government were not due to failures to perform required obligations. Instead, the time periods cited were devoted to the argument and consideration of the difficult legal issues presented by petitioner's case.

Id. at 139.

149. *Doherty v. Thornburgh*, 943 F.2d 204, 212 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992). The Court of Appeals also made its own inquiry, finding Doherty primarily responsible. The court hinted that, in order for the government to be responsible for delay, there must be some "invidious purpose, bad faith, or arbitrariness" to be found on its part. *Id.* This suggests that the government may exhaust all judicial processes to achieve its goal without being blamed for delay, but an alien risks being blamed for delay by doing the exact same thing.

150. *Id.* at 214 (Altimari, J., dissenting).

151. This situation should be compared to *Dor v. District Director*, 891 F.2d 997 (2d Cir. 1989), in which petitioner remained in detention for over five years after his final order of deportation had been issued solely because of his repeated, unsuccessful appeals of various decisions against him. The court found that "Dor's continued presence in the United States, and his sustained detention, result[ed] from the simple fact that — at his urgent request and by [the court's] stay — [it] allowed his application to be exhaustively adjudicated by the I.N.S." *Id.* at 1003.

if released, would abscond and not surrender for deportation.”¹⁵² While the district court found that Doherty presented a serious bail risk, these risks should have been accepted “to avoid unconscionable deprivations of the liberty of individuals.”¹⁵³ There is always a risk inherent in the release of any individual on bail which at some point must be outweighed by the protection of the Constitution.

In a due process analysis, an appellate court is entitled to a broad standard of review of the District Court’s risk-of-flight determination.¹⁵⁴ However, the Second Circuit gave no weight to the evidence supporting Doherty’s ties to the community — the \$800,000 bail package that was organized on his behalf and the broad public and personal support that he had achieved in this country.¹⁵⁵ In addition, the court failed to explore other conditions of parole, such as a larger bail amount or an electronic bracelet.¹⁵⁶ Thus, the cursory consideration given by the district court to Doherty’s community ties and other conditions of parole illustrated the court’s unwillingness to seriously consider the alien’s substantive due process rights. With a broader standard of review, the appellate court could have considered the factors which were omitted from the lower court’s analysis. Additionally, the Second Circuit has implied that the risk of flight determination should be given less weight as the passage of time of an individual’s detention increases.¹⁵⁷ Thus, in light of Doherty’s community ties, large bail package, and unusually long detention, the lower court’s risk of flight determination should not have been afforded such great weight.

152. *Doherty v. Thornburgh*, 750 F. Supp. at 139.

153. *United States v. Gonzales Claudio*, 806 F.2d 334, 343 (2d Cir. 1986).

154. *Id.* See also *supra* notes 73-75 and accompanying text.

155. Doherty had established several close friends since he had been in the United States, who had submitted affidavits in support of his application for release on bond, attesting to his good character and pledging their assets to secure his bond. Brief for Appellant at 22, *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991) (No 91-2044), *cert. dismissed*, 112 S. Ct. 1254 (1992). Doherty was also visited personally by the Archbishop of New York, United States Senators and Representatives, the Reverend Jesse Jackson, and other influential people who had offered nothing but support to the detainee. *Id.* at 24-28

156. See, e.g., *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (noting appellant’s willingness to abide by any conditions imposed upon his release from confinement, “including a prohibition against leaving [the area], daily reporting to an appropriate government official and the use of a radio bracelet warning system.”). This was mentioned in Doherty’s case in the oral argument before the Court of Appeals but was not addressed in the opinion.

157. See *Ojeda Rios*, 846 F.2d at 169. See *supra* notes 78-81 and accompanying text.

Finally, special consideration must be given in the immigration context to the government's control over foreign policy.¹⁵⁸ The government claims that "where an alien's flight would affect the nation's foreign policy, the risks ordinarily associated with granting bail are magnified."¹⁵⁹ While it is easy for a court to give deference to the Attorney General's decision to detain, there must be a point at which the individual's liberty interest will exceed the speculative nature of the effect that the release will have on the United States' relations with Great Britain. The United Kingdom could not expect the United States to act outside the bounds of its Constitution simply because their extradition treaty failed to provide a means for Doherty's deportation and had not yet been amended with the removal of the political offense exception.¹⁶⁰

Recognizing the seriousness of an individual's liberty interest, "the Due Process Clause endeavors to set outer limits at which risks to society must be accepted to avoid unconscionable deprivations of . . . liberty."¹⁶¹ Such a limit must have been reached in this case. If Doherty's substantive due process rights have not been violated at this point, it is doubtful that they would ever be violated.¹⁶² By holding that Doherty could lawfully be detained for over eight years without having been accused of a crime in the United States, the court set a dangerous precedent which may stand for the proposition that an individual's liberty interest will at no point exceed the foreign policy concerns of the government. The Constitution does not allow such a principle to exist. It is undeniable that at some point Doherty's detention constitutes impermissible punishment rather than permissible regulation.¹⁶³ A detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.¹⁶⁴

Because the length of Doherty's detention had been so extensive and no significant blame could be attributed to Doherty or the government for each day of detention, these factors out-

158. See *supra* notes 134-37 and accompanying text.

159. Brief for Appellee at 35, *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991) (No. 91-2044), *cert. dismissed*, 112 S. Ct. 1254 (1992).

160. See *supra* notes 19-23 and accompanying text.

161. *United States v. Gonzales Claudio*, 806 F.2d 334, 343 (2d Cir. 1986).

162. For example, how much different would the analysis be three years later?

163. *United States v. Salerno*, 481 U.S. 739, 746-47 (1987).

164. *White v. Roper*, 901 F.2d 1501, 1504 (9th Cir. 1990).

weighed the risk of Doherty's flight and the government's interest in immigration and foreign policy. The point had been reached where his detention exceeded that which is constitutionally permissible despite the nature of his political affiliation and the government's strong interest in his continued detention. By avoiding an enunciated constitutional analysis, the Second Circuit revealed its unwillingness to seriously consider the substantive due process rights of Joseph Doherty.

IV. CONCLUSION

In *Doherty v. Thornburgh*, the Second Circuit attributed undue weight to the government's strong desire not to release Doherty on bail while his various judicial proceedings were being litigated. The Constitution requires that at some point the individual's interest in liberty must outweigh the government's interests in detaining a deportable alien. A principled constitutional analysis would determine the constitutionality of such detention by weighing the length of the detention against the government's responsibility for the delay and the risk that the alien will abscond. This determination should be made in light of the government's strong interest in foreign policy. In order to give this test any meaning, it must be used as a real determination of an alien's constitutional rights rather than having the courts defer to the discretion of the Attorney General. In the case of Joseph Doherty, eight years of detention was unjustifiable and violated his substantive due process rights under the Fifth Amendment of the United States Constitution.

Michael H. Williams

