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Clark v. Martinez: Striking a Balance Between United States Security and Due Process Rights of Illegal Immigrants

By Michelle Mitsuye Shimasaki *

I. INTRODUCTION

They just lock us up and throw away the key. It's like a people business for them. They don't care about us. They have beds here and it's like they're losing business unless they fill up the beds. So they just keep us locked down... I understand that I made a mistake, but I already did my time for that. Here I don't even know how much time I have to do. The law doesn't make any difference for us. It just doesn't make any sense.¹

* J.D. Candidate at Pepperdine University School of Law, 2007. B.A. Political Science and B.A. Psychology, 2003, University of California, Irvine. I would like to thank my Mom, Dad, Michael, and Andrew for their love, prayers, and encouragement. Mike, thank you for your love, patience, and understanding. I would also like to give thanks to God for His grace, mercy, faithfulness and unconditional love.

¹ Michelle Carey, Comment, “You Don’t Know if They’ll Let You Out in One Day, One Year, or Ten Years...” Indefinite Detention of Immigrants After Zadvydas v. Davis, 24 CHICANO-LATINO L. REV. 12, 12 (2003).

This is how Sergio Martinez characterizes indefinite detention. As of my interview with him on October 19, 2001, just weeks after the events of September 11th, Mr. Martinez had already been incarcerated at the Immigration and Naturalization Service Processing Center in San Pedro, California, (hereinafter "San Pedro SPC"), for over ten months. An Afro-Cuban who arrived in the United States as part of the "Mariel Boatlift" in 1980, Mr. Martinez moved to Fresno soon after his arrival. He has been in
The issue of what to do with inadmissible aliens who are non-removable has been a question that, until recently, had been left unanswered. Once an inadmissible alien, an alien who has illegally entered the country or who has not gained admission into the United States, commits a crime, the dilemma begins. The dilemma is: what should the United States do with this alien? The first recourse will often be to try and deport the alien to their country of origin, but sometimes this proves to be impossible because there is no repatriation agreement with the country, or because the country the United States wants to deport the alien to simply refuses to admit the alien into their country. Once the inadmissible alien has finished serving their sentence in a United States prison, the question is whether the United States can simply hold the alien indefinitely.

In the past, the rights of the alien and the security concerns of the United States were left out in the open. There were those activists who argued that aliens also had due process rights under the Fifth Amendment, and there were those who counter-argued for the security of the United States and its citizens. The United States Supreme Court decided to answer these concerns and questions in the Clark v. Martinez case. This case note examines the Clark v. Martinez decision. Martínez is a decision of the U.S. Supreme Court regarding habeas corpus proceedings involving the indefinite detention of illegal aliens within the United States. The decision by the Court in Martínez was

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*Author's Note: I tried to find out whether the Sergio Martínez quoted here is the same Sergio Martínez as the one in the Clark v. Martínez case. I was able to locate the author of the article, yet we were unable to determine whether this was the same Sergio Martínez. I would like to thank Ms. Carey for her time and help in this matter.*

4. See Martínez, 543 U.S. 371, 385-86, 727 and Carey, supra note 1, at 12.
6. Id.
7. Id. at 372-73. The term habeas corpus is defined as "[a] writ employed to bring a person before a court, most frequently to ensure that the party's
greatly influenced by the Court’s previous decision in *Zadvydas v. Davis*. The Court in *Martinez* chose to expand the ruling in the *Zadvydas* case, examining its ruling of that case in greater detail, and relating it to the case at hand.

Part II of this paper will examine the background of the *Martinez* case, and also provide insight into the relevant statutes and case law which have shaped the Court’s decision. Part III will look at the specific facts of the *Martinez* case. Part IV will analyze and critique Justice Scalia’s majority opinion, Justice O’Connor’s concurring opinion, and Justice Thomas’ dissenting opinion of the case. Part V will look at the impact and significance the case has had, or will likely have in future Court decisions. Part VI will conclude this note on *Martinez* and examine what the case’s impact will likely have on lower courts and future legislation.

II. BACKGROUND

*A. Historical Overview of Immigration Law*

The Immigration Act of 1875 may signal the first of many restricting statutes for classes of aliens in the United States. The subsequent Immigration Act of 1882 continued the trend and excluded more classes of aliens from admission into the United States. Subsequent Immigration Acts were enacted, which imposed literacy tests and quotas to help ensure that the number of immigrants

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imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 728 (8th ed. 2004).

11. *See infra* notes 129-156.
16. *Id.*
admitted remained limited. The "National Origins Act" passed in 1924, posed another obstacle to immigration, by reducing the quota of immigrants to two percent and requiring visas for travel.

The Immigration and Nationality Act (INA) of 1952, was then passed to help consolidate the previous immigration laws, and has undergone several amendments. The Immigration and Naturalization Service (INS) was established by the INA of 1952 and the Attorney General was given certain powers. One of the INS' main duties was to help with the process of providing benefits to aliens under the U.S. immigration laws. Since the Immigration Act of 1952, there have been several changes to the Act in subsequent years.

One major change has involved the transferring of some powers to the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS). The United States Immigration and Customs Enforcement (ICE) and the United States Customs and Border Protection (CBP) each respectively investigate and enforce immigration laws, and protect the borders.

**B. The Fifth Amendment**

The Fifth Amendment states:

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be*

17. *Id.* at 2860-61. The Immigration Act of February 5, 1917 limited immigrants by imposing a literacy test while the Immigration Act of May 19, 1921 set a quota of immigrants who could be admitted into the U.S. *Id.*

18. *Id.* at 2861.

19. *Id.* at 2862.

20. *Id.*

21. *Id.* at 2863.

22. *Id.*

23. *Id.* at 2863-64. The transfer occurred on March 1, 2003. *Id.*

24. *Id.* at 2864.
compelled, in any criminal case, to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.\textsuperscript{25}

The Fifth Amendment has proven to be important in immigration law largely due to the use of the word “person”, which has been held to mean those who are present in the United States and not just United States citizens.\textsuperscript{26} The Due Process right of aliens has been a key issue in immigration law and was a major issue in *Clark v. Martinez*.\textsuperscript{27}

The Fourteenth Amendment has also been important to immigration law in that it states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.\textsuperscript{28}

The Fourteenth Amendment, like the Fifth, is important to immigration law because it uses the language “any person” in the United States should be given “equal protection.”\textsuperscript{29} Both the Fifth and Fourteenth Amendments have helped establish that aliens who are present in the country have due process rights and are afforded the protections of the Constitution, even though they may not be American citizens.\textsuperscript{30} These rights are probably instrumental in helping to define the statutes and procedures that have been put into place to ensure that an immigrant’s rights are being protected.

\textsuperscript{25} U.S. CONST. amend. V. (emphasis added).
\textsuperscript{26} Wong Wing v. United States, 163 U.S. 228, 242 (1896).
\textsuperscript{28} U.S. CONST. amend. XIV, § 1 (emphasis added).
\textsuperscript{29} Id.
\textsuperscript{30} See infra notes 25-29.
C. Immigration and Removal Proceeding Statutes

Ordinarily, once an alien is deemed inadmissible and is ordered to be removed, the Secretary of Homeland Security is required to remove the alien from the United States within ninety days. Accordingly, unless an alien "is found 'clearly and beyond a doubt entitled to be admitted,'" he must go through "removal proceedings to determine admissibility." However, the Secretary is permitted to detain an inadmissible alien after the ninety day period for a time reasonably necessary to achieve removal. This section of the statute applies whether or not an alien has been admitted into the United States. The post-removal statutes apply to aliens ordered removed, which includes: inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien 'who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.'

In the Zadvydas v. Davis case, the dissent pointed out that the Attorney General was given a structure to follow in exercising the option of detaining an alien past the removal period. First, there would be a post-custody review. Secondly, an alien would be allowed to present "relevant information in support of [his] release", and the director would have the discretion to allow for a personal interview with the alien. After the ninety days have passed, there would be an "initial custody review within three months of [the

36. Id. at 722-23.
37. Id. (according to 8 C.F.R. § 241.4 (2001)).
38. Id. (according to § 241.4(h)(1)).
alien’s] transfer." If the decision is that the alien will remain in detention, a panel consisting of two INS officers will review the case and make recommendations to INS headquarters. Accordingly, the INS must give the alien thirty days written notice of the reviews, and must allow the alien to submit information to be considered at the review. During the review, in accordance with the statute, an alien will be entitled to assistance by a “representative of his choice.” Additionally, an alien must be given a copy of the INS’ decision, which will include a brief reason for continued detention.

During the review, certain factors will be taken into consideration. Amongst the factors the panel will consider are: “the alien’s disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and [other] favorable factors such as family ties.” In order to authorize an alien’s release, the panel must find: that the alien will not be violent, the alien won’t “pose a threat to the community”, and the alien won’t try and flee if released, or “violate the conditions of release.” In particular, the alien has to prove “to the satisfaction of the Attorney General that he will pose no danger or risk of flight.” If in the end the panel decides not to release the alien, then it must review the matter again within a year; and earlier if conditions change.

D. Habeas Corpus Proceedings and Historical Overview of Immigration Case Law

A common aspect of immigration case law involves judicial review and writs of habeas corpus. The U.S. Supreme Court also acknowledged that aliens are entitled to due process under the Fifth

39. Id. (according to § 241.4(k)(2)(ii)).
40. Zadvydas, 533 U.S. at 688 (according to § 241.4(k)(2)(iii)).
41. Id. (according to § 241.4(i)(3)(ii)).
42. Id. (according to § 241.4(i)(3)(i),(ii)).
43. Id. (according to § 241.4(d)).
44. Id. at 683.
45. Zadvydas, 533 U.S. at 688 (referring to § 241.4(f)).
46. Id. (referring to § 241.4(e)).
47. Id. at 683-84 (citing § 241.4(d)(1)).
48. Id. at 684 (citing §§ 241.4(k)(2)(iii),(v)).
Amendment for deportation proceedings, but the Court acknowledged that detaining aliens during this process is valid. In *Shaunnessy v. Pedreiro*, the Court stated that “[t]he legislative history of both the Administrative Procedure Act and the 1952 Immigration Act supports respondent’s rights to full judicial review of this deportation order.” In *Pedreiro*, under the Immigration and Nationality Act of 1952, an alien was ordered removed. He tried to have the deportation order removed and claimed that he had been forced to incriminate himself. The Court held that there was a right to judicial review of a deportation order, which could be done besides habeas corpus and that the remedy which was sought was “appropriate” in this case.

In *INS v. St. Cyr*, the Court explained that “habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” Prior to the Immigration and Nationality Act of 1952, the only way an alien could contest his or her deportation order was to bring a writ of habeas corpus in district court. The Court also pointed out that historically in immigration law the terms “judicial review” and “habeas corpus” have had “distinct meanings.” The Court also pointed to the importance of “congressional intent.”

In *Shaunnessy v. United States ex rel. Mezei*, there was an alien who had been lawfully admitted into the United States and who subsequently left the United States, and upon return was refused


51. *Id.* at 49.

52. *Id.*

53. *Id.* at 52.


55. *Id.* at 305.

56. *Id.* at 311.

57. *Id.* at 314.
admission.\textsuperscript{58} He was left on Ellis Island indefinitely and detained there because no other country would accept him.\textsuperscript{59} The Court held that the alien's detention did not violate the Constitution.\textsuperscript{60} The Court pointed out that the "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."\textsuperscript{61} The Court in Zadvydas distinguished this case because the alien's departure in Mezei made him have to seek reentry into the US, and therefore the alien's presence on Ellis Island was not reentry into the US, but the equivalent of being "stopped at the border."\textsuperscript{62}

In the past, "territorial distinctions" in immigration law were vital.\textsuperscript{63} In the twentieth century immigration law would classify aliens as either physically inside the United States or not physically present within the United States.\textsuperscript{64} If the United States had stopped an alien at the border and did not want to permit them to enter, then "exclusion" proceedings would take place.\textsuperscript{65} In contrast, if an alien had entered into the United States with approval, then the United States would commenced "deportation" proceedings to send the alien to another country.\textsuperscript{66} The distinction between the two different

\textsuperscript{58} Shaugnessy v. United States \textit{ex rel.} Mezei, 345 U.S. 206, 207-10 (1953). This case is considered the "precedent for the issue of indefinite detention." Thomas Pulley, Note, \textit{Nowhere To Go: The Indefinite Detention of Inadmissibile Aliens in Benitez v. Wallis.}, 73 U. CIN. L. REV. 1165, 1168 (2005). In Mezei, the Court had permitted an ""excludable alien' to be indefinitely detained." \textit{Id.} at 1176.

\textsuperscript{59} Pulley, \textit{supra} note 58, at 1176.

\textsuperscript{60} \textit{Id.} at 216. The Court concluded by commenting on Congressional authority, saying "[w]hatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." \textit{Id.}

\textsuperscript{61} \textit{Id.} at 210.

\textsuperscript{62} Zadvydas, 533 U.S. at 693.

\textsuperscript{63} Charles D. Weisselberg, \textit{The Detention and Treatment of Aliens Three Years After September 11: A New New World ?}, 38 U.C. DAVIS L. REV. 815, 817 (2005).

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.}
groups was of particular significance, because they were treated very differently: aliens subject to "deportation" were given greater protections and rights than those who were subject to "exclusion" proceedings. The rationale behind this different treatment was attributed to the presumption that aliens who had already crossed the border might have greater ties to the United States than those stopped at the border. In the case of the Mariel Cubans from 1980, many were paroled into the United States, but others were not and could not be returned to Cuba. As a result, many of them have lived in the United States for almost twenty-five years, but are still considered stopped at the border. This result and others like it is why the "entry doctrine is often called the entry 'fiction'."

In *Crowell v. Benson*, the Court decided that when an Act of Congress raises "serious doubt" about its constitutionality, then the Court will first decide if an interpretation of the statute is possible where the question of constitutionality may be avoided. Then in *Zadvydas*, the Court held that a construction of the statute which avoids invalidation would be the best interpretation of congressional intent. The Court in *Zadvydas* concluded that in order for the statute to be in compliance with the Constitution's demands, the post-removal detention period had to be reasonably necessary to ensure the alien's removal from the United States, and that no indefinite detention was allowed.

Other cases also demonstrate basic principles and rules which govern aliens in the United States and immigration law. In *Kaplan v. Tod*, the Court found an immigration law distinction between aliens who had effected entry into the United States and those who had never effected entry into the United States. *Kaplan* involved an

67. *Id.*
68. *Id.*
70. *Id.*
71. *Id.*
73. *Zadvydas*, 533 U.S. at 689.
74. *Id.*
appeal from a dismissal of habeas corpus.\textsuperscript{76} The petitioner was trying to argue that she was a U.S. citizen who was unlawfully detained for deportation in violation of the Fifth Amendment.\textsuperscript{77} The petitioner had been born in Russia and had arrived in the United States when she was thirteen.\textsuperscript{78} She was supposed to be deported, but her deportation was suspended after the European war began and she remained on Ellis Island until June 1915.\textsuperscript{79} The Court, in looking at this case, explained that those stopped at Ellis Island are “still in theory of law at the boundary line and [have] gained no foothold in the United States.”\textsuperscript{80}

In \textit{Leng May Ma v. Barber}, the Court found that an alien who was “paroled” into the United States had not actually entered into the United States.\textsuperscript{81} The petitioner in \textit{Leng May Ma} came to the U.S in 1951, saying that she had U.S. citizenship because her father was a U.S. citizen.\textsuperscript{82} She was first placed in custody but was later released on parole in August 1952.\textsuperscript{83} After she was unable to prove her claim, she was excluded and before she was deported she claimed that she would suffer at the hands of the existing government in China.\textsuperscript{84} She petitioned for a writ of habeas corpus.\textsuperscript{85} The Court in its deliberations pointed out that Congress did not intend that parole

\textit{Inadmissible Aliens} in Benitez v. Wallis, 73 U. CIN. L. REV. 1165, 1167 (2005). The classification of “inadmissible” refers to those aliens who do not possess a legal right to enter the U.S. \textit{Id.} In contrast, the term “deportable alien” refers to those who had obtained legal status to be in the United States but have had that standing revoked. \textit{Id.} Currently, 8 U.S.C. § 1182(a)(6)(A)(i) permits “[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General [to be] inadmissible.” \textit{Id.} at 1177. As a result of this, the current statutes tend not to focus as much on the distinction between aliens who have never gained entry from those who may have gained entry illegally. \textit{Id.} at 1177-78.

\textsuperscript{76} Kaplan, 267 U.S. at 229.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 230.
\textsuperscript{81} Leng May Ma v. Barber, 357 U.S. 185, 188-90 (1958).
\textsuperscript{82} \textit{Id.} at 186.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
would equal entry and admission of the alien into the United States.\textsuperscript{86} The Court held that parole status did not entitle the petitioner to benefit from a statute which would allow the Attorney General to withhold deportation of an alien who was "within the United States" if the alien could face physical persecution.\textsuperscript{87}

In \textit{United States v. Verdugo-Urquidez}, the Court found that certain constitutional protections which are granted inside the United States, did not apply to aliens outside of U.S. borders.\textsuperscript{88} \textit{Verdugo-Urquidez} involved the U.S. government obtaining an arrest warrant for a Mexican citizen thought to be involved in smuggling drugs into the United States.\textsuperscript{89} After he was arrested, Drug Enforcement Administration (DEA) agents along with Mexican officials searched his residences in Mexico and seized documents in the process.\textsuperscript{90} The respondent made a motion to suppress the evidence by claiming it was obtained in violation of the Fourth Amendment which covers searches and seizures.\textsuperscript{91} The Court held that the Fourth Amendment did not apply to searches and seizures which were conducted by U.S. agents when the property was not located inside the United States, and when it was owned by a nonresident alien.\textsuperscript{92}

In \textit{Plyer v. Doe}, the Court decided that once an alien did enter the United States, they were given protection under the Due Process Clause because the clause applies to all "persons" within the United States, including aliens regardless of whether their presence in the United States is lawful, or unlawful.\textsuperscript{93} \textit{Plyer v. Doe} was a suit in Texas which was brought on behalf of children of Mexican origin who could not prove they had entered the United States legally.\textsuperscript{94} The suit was brought because of the children's exclusion from public schools and the denial of public education to them.\textsuperscript{95} The Court held that the State could not deny the children public education, and that

\textsuperscript{86} Id. at 188.
\textsuperscript{87} Id. at 190.
\textsuperscript{89} Id. at 259.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Plyer v. Doe, 457 U.S. 202, 212 (1982).
\textsuperscript{94} Id. at 206.
\textsuperscript{95} Id.
once aliens had entered the United States they were to be afforded constitutional protections. 96

In Wong Wing v. United States the Court held that the Due Process Clause protects an alien who is subject to a final deportation order and found a statute which imposed a year of hard labor on aliens who were subject to deportation, to be unconstitutional. 97 In Wong Wing four people were brought before a court and charged as being Chinese aliens who were illegally in the United States. 98 They were sentenced to hard labor for sixty days and afterwards were ordered to be deported from the United States to China. 99 A writ of habeas corpus was issued. 100 The Court found that punitive measures could not be imposed on these aliens because all "persons" in the United States were granted constitutional protections. 101 While these cases are relevant to the background of Clark v. Martinez, the case which the Court uses to support its decision in Martinez is the Zadvydas v. Davis case outlined below.

96. Id. at 210-30.
97. Wong Wing v. United States, 163 U.S. 228, 238 (1896). The Court in Wong Wing found that the Fifth Amendment's Due Process Clause as well as the Fourteenth Amendment did apply to "all persons within the territory of the United States." Thomas Pulley, Note, Nowhere To Go: The Indefinite Detention of Inadmissible Aliens in Benitez v. Wallis, 73 U. CIN. L. REV. 1165, 1178-79 (2005).
98. Wong Wing, 163 U.S. at 229.
99. Id.
100. Id.
101. Id.

On its face, § 1231(a)(6) does not inflict punishment on an easily identifiable group. The country does need the ability to restrain the freedom of those who try to gain entry into the United States illegally or have already gained entry and need to be removed. However, the application of the law can cause problems. The conditions and length of confinement of liberty can definitely rise to the level of punishment. Without narrowing interpretations or revision, the statute leaves the door open for such problems.

§ 1231(a)(6) provides:
(a) Detention, release, and removal of aliens ordered removed
(6) Inadmissible or criminal aliens
An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3). 102

In Zadvydas, the Court interpreted § 1231(a)(6) to authorize the detention of aliens who were admitted into the United States, only for a time “reasonably necessary” to remove them. 103 The Zadvydas case actually was comprised of two cases decided together by the Court. 104 Zadvydas was a resident alien who had Lithuanian parents and who was born in a German camp for displaced persons. 105 Due to his criminal record, Zadvydas was ordered to be deported, but both Lithuania and Germany refused to accept him because he was not a citizen of either country. 106 Attempts to deport him to his wife’s home country also failed. 107 He filed a habeas corpus action under 28 U.S.C. § 2441 after the removal period had expired and he remained in custody. 108 The District Court granted the writ because it felt that the government would never remove Zadvydas, and that this permanent detention would result in a violation of the

103. Martinez, 543 U.S. at 371. “Reasonableness” would be measured in terms of “assuring the alien’s presence at the moment of removal.” Zadvydas, 533 U.S. at 699. If it turns out that removal is not reasonably foreseeable, then the court should hold that continued detention would be unreasonable and is no longer covered by the statute. Zadvydas, 533 U.S. at 699-700.
104. Zadvydas, 533 U.S. at 686.
105. Id. at 678.
106. Id.
107. Id.
108. Id.
Constitution. The Fifth Circuit reversed, saying that there was no constitutional violation because the eventual deportation of Zadvydas was never possible, but that it was fine as long as good faith efforts to remove him continued.

The other petitioner in the Zadvydas case was Kim Ho Ma. Kim was a resident alien who had been born in Cambodia and was ordered removed because of an aggravated felony conviction. After his removal period expired, Kim filed under § 2241 when he was detained further. The district court ordered his release since there was no realistic chance he would be removed, because Cambodia did not have a repatriation treaty with the United States. The Ninth Circuit Court affirmed the decision.

The U.S. Supreme Court then had to decide whether the post-removal statute, 8 U.S.C. § 1231(a)(6), authorized the Attorney General to detain an illegal alien indefinitely once the removal period expired, or if the alien could only be detained as “reasonably necessary” to ensure his removal.

The Court held that § 2441 allows constitutional challenges to post-removal detention and that there are no restrictions on judicial review of removal decisions. The Court held that continued detention after the expiration of the removal period had to be reasonable, based on the time it would take to remove the alien from the United States, and that indefinite detention was not permitted. The determination of what constituted a “reasonable time” would be subject to federal court review. The Court assumed that after a six month period of detention there is the possibility the alien may never

109. *Id.*
110. *Zadvydas*, 533 U.S. at 678.
111. *Id.*
112. *Id.*
113. *Id.* “§ 2441 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.” *Id.* at 688.
114. *Id.*
115. *Id.* at 682.
116. *Id.* at 678-79.
117. *Id.* at 679.
118. *Id.* at 682.
be removed, and the government must rebut this assumption.\(^{119}\) In the end, both Zadvydas’ and Kim’s cases were vacated and remanded.\(^{120}\)

The dissent argued that the Immigration and Nationality Act (INA) and 8 U.S.C. § 1101 said that:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).\(^{121}\)

The dissent argued that Congress had given the Attorney General discretion to detain an alien who had been ordered removed, even if the detention was “beyond the removal period.”\(^{122}\) The dissent accused the majority of refusing to interpret the statute literally and refusing to offer an alternate interpretation.\(^{123}\) The dissent also pointed out that Congress had anticipated the hardships that aliens could face if they could not be repatriated, and therefore created § 1231(a)(7), which allows the alien to be eligible for employment in the United States.\(^{124}\) The dissent also emphasized that the six month detention period was invented by the courts to protect the community, and not to negotiate the alien’s return.\(^{125}\)

Despite its decision, the Court in \textit{Zadvydas} conceded that “[a]liens who have not yet gained initial admission to this country

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\(^{119}\) \textit{Id.} The sixth month period does not mean that every alien will have to be released after six months has passed, because an alien can be held in confinement until he is able to show there is no likelihood of him being removed in the future. \textit{Id.} at 701.

\(^{120}\) \textit{Id.} at 681.


\(^{122}\) \textit{Id.}

\(^{123}\) \textit{Id.}

\(^{124}\) \textit{Id.} at 708.

\(^{125}\) \textit{Id.} The safety of the community allows for the periodic review of the alien’s detention in 8 C.F.R. § 241.4 (2001). \textit{Id.} An alien’s criminal record should indicate the risks they could pose to the community. \textit{Id.} at 714.
would present a very different question.”\textsuperscript{126} In 2005, the Court was presented with this very question in an immigration case.\textsuperscript{127} This issue was handed to the Court in \textit{Clark v. Martinez} and in making its decision, the Court frequently referred back to its decision in \textit{Zadvydas}.\textsuperscript{128} The facts of \textit{Martinez} are outlined below, followed by the Court’s holding and reasoning.

III. FACTS

The Court began by referring to the \textit{Palma v. Verdeyen} case for the Mariel Boatlift facts.\textsuperscript{129} 125,000 Cubans arrived in Florida in 1980 in a small fleet of boats due to a situation in which the Cuban authorities had told criminals to leave for the United States or remain in prison.\textsuperscript{130} Upon arrival to the United States about twenty-five thousand of them admitted some criminal history, and out of those, two thousand had backgrounds which required further detention.\textsuperscript{131} Most of the immigrants from this incident were paroled under INA 8 U.S.C. § 1182(d)(5) after sponsors were found for them.\textsuperscript{132} As for the 2,000 Cuban immigrants who were detained, they were sent to various federal prisons to await proceedings against them and were not eligible for parole.\textsuperscript{133} The Attorney General announced that the government would return the immigrants ineligible for parole back to Cuba during the summer of 1981, but the Cuban government refused to take them back.\textsuperscript{134}

Sergio Suarez Martinez and Daniel Benitez both arrived in the United States from Cuba on June 1980 as members of the Mariel Boatlift.\textsuperscript{135} Both men were paroled into the United States according

\begin{itemize}
\item[126.] Id. at 682.
\item[128.] Id.
\item[129.] Id. at 374 (referring to \textit{Palma v. Verdeyen}, 676 F.2d 100 (4th Cir. 1982) and \textit{Benitez v. Wallis}, 337 F.3d 1289, 1290 (11th Cir. 2003).
\item[130.] \textit{Palma v. Verdeyen}, 676 F.2d 100, 101 (4th Cir. 1982).
\item[131.] Id.
\item[132.] Id.
\item[133.] Id.
\item[134.] Id. at 102.
\item[135.] \textit{Martinez}, 543 U.S. at 374.
\end{itemize}
to the Attorney General’s authority under § 1182(d)(5). Up until 1996, the federal law had permitted Cubans to be paroled into the United States in order to adjust their status and to become lawful permanent residents after one year. However, both men were not candidates for this because when they applied, both had prior criminal convictions in the United States. Martinez had sought adjustment in 1991 but had been convicted of assault with a deadly weapon in Rhode Island, and of burglary in California. Benitez had sought adjustment in 1985 but had been convicted of grand theft in Florida. In addition to this, both men were convicted of other felonies after their adjustment applications were denied. Martinez was convicted of petty theft with a prior conviction, assault with a deadly weapon, and attempted oral copulation by force. Benitez was convicted of two counts of armed robbery, armed burglary of conveyance, carrying a concealed firearm, unlawful possession of a firearm while engaged in a criminal offense, and unlawful possession/delivery of a firearm with an altered serial number.

In December of 2000, Martinez’s parole was revoked by the Attorney General and INS took him into custody, resulting in the commencement of removal proceedings. The immigration judge found him inadmissible because of his prior conviction under § 1182(a)(2)(B) as well as for lack of sufficient documentation under § 1182(a)(7)(A)(i)(I), therefore ordering that Martinez be removed to Cuba. Martinez did not appeal. Martinez was then detained by the INS beyond the 90 day removal period, and remained in custody

136. Id.
137. Id. (referring to the Cuban Refugee Adjustment Act, 80 Stat. 1161 and 8 U.S.C. §1255 (2001)).
138. Id.
139. Id.
140. Id.
141. Martinez, 543 U.S. at 374.
142. Id.
143. Id. at 374-75.
144. Id. at 375.
145. Id.
146. Id.
until the District Court ordered his release, and the Court of Appeals affirmed.\textsuperscript{147}

Benitez had his parole revoked in 1993, and the INS initiated removal proceedings against him.\textsuperscript{148} In December of 1994, an immigration judge determined that Benitez was excludable, and ordered him deported under §§ 1182(a)(2)(B) and 1182(a)(7)(A)(i)(I).\textsuperscript{149} Benitez did not seek further review.\textsuperscript{150} The INS took Benitez into custody and detained him beyond the ninety day removal period.\textsuperscript{151} In September of 2003, Benitez found out he was eligible for parole, contingent on completion of a drug abuse treatment program, completed the program, and was released from custody to sponsoring family members while his case was pending.\textsuperscript{152}

Both Benitez and Martinez filed petitions for a writ of habeas corpus under 28 U.S.C. § 2241 to challenge their detentions beyond the ninety day period.\textsuperscript{153} The District Court ordered release of Martinez under acceptable conditions to the INS and the Court of Appeals affirmed.\textsuperscript{154} The District Court found that in Benitez’s case, removal would not occur in the “foreseeable future,” but denied his petition, and the Court of Appeals affirmed.\textsuperscript{155} The United States Supreme Court granted certiorari in both cases.\textsuperscript{156}

\section*{IV. Analysis and Critique}

\textbf{A. Application of Zadvydas v. Davis}

As mentioned above, the Court’s decision in Zadvydas is of particular importance to the Court’s decision in Clark v. Martinez.\textsuperscript{157} In Zadvydas, the Court was concerned with the interpretation of §

\begin{itemize}
\item 147. Martinez, 543 U.S. at 375.
\item 148. Id.
\item 149. Id.
\item 150. Id.
\item 151. Id.
\item 152. Id.
\item 153. Martinez, 543 U.S. at 376.
\item 154. Id. at 377.
\item 155. Id.
\item 156. Id.
\end{itemize}
1231(a)(6) and held that it authorized the detention of aliens who were admitted into the United States, only for a time "reasonably necessary" to remove them.\textsuperscript{158} The \textit{Martinez} decision expanded the Court's holding in \textit{Zadvydas} by deciding that the interpretation it had adopted in \textit{Zadvydas} was also applicable to \textit{inadmissible aliens}.\textsuperscript{159}

\textbf{B. Majority Opinion: Justice Scalia}

Justice Scalia, in the majority opinion of \textit{Martinez}, closely examined Title 8 U.S.C. § 1231(a)(6).\textsuperscript{160} In examining this provision, the Court held that the Secretary could detain an inadmissible alien after the 90 day removal period expired as long as it was "reasonably necessary" to achieve removal.\textsuperscript{161} The Court went on to explain that the "may be detained beyond the removal period" language of § 1231(a)(6) was applicable to both aliens who were admitted into the United States and those who were not.\textsuperscript{162} The majority opinion clearly stated that this interpretation of § 1231(a)(6) also pertained to "inadmissible aliens."\textsuperscript{163} The Court explained that § 1231(a)(6) applied to three categories of aliens: "(1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk."\textsuperscript{164}

\begin{flushright}
\textsuperscript{158} \textit{Zadvydas}, 533 U.S. at 686, 689. \\
\textsuperscript{159} \textit{Martinez}, 543 U.S. at 386. \\
\textsuperscript{160} \textit{Id.} at 377. \\
\textsuperscript{161} \textit{Id.} \\
\textsuperscript{162} \textit{Id.} \\
\textsuperscript{163} \textit{Id.} at 386. \\
An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [Secretary] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3). \textit{Id.} at 377. \\
\textsuperscript{164} \textit{Martinez}, 543 U.S. at 386. 
\end{flushright}
Justice Scalia also examined the Court’s decision in the *Zadvydas* case.166 In *Zadvydas*, the Court had held that the Attorney General (now the Secretary) had the ability to detain aliens deemed removable under § 1227(a)(1)(C), (a)(2), or (a)(4) for as long as was "reasonably necessary" to effectively remove them from the United States.166 In examining the language of the statute closely, the Court held the word "may" would imply that the Attorney would have "discretion" but not "unlimited discretion" – the discretion would apply to the statute’s purpose for removing the alien.167 The Court stressed that once it was determined that removal was “no longer reasonably foreseeable” the alien could not be detained any further.168 The Court had deemed that six months was a reasonable period to carry out the alien’s removal from the United States.169 After the expiration of the six month period, the alien would be eligible for conditioned release but had to demonstrate there was “no significant likelihood of removal in the reasonably foreseeable future.”170

The main issue identified by the Court in the *Martinez* case was whether the application of § 1231(a)(6) as applied in the *Zadvydas* case, also covered aliens “ordered removed who are inadmissible under [§] 1182.”171 The Court concluded that § 1231(a)(6) as interpreted by the Court would apply to all three categories of aliens, because if the Court were to give a different meaning to the words “may be detained beyond the removal period” for each category, it would be creating a statute rather than interpreting the statute.172

The Court took into account the dissenting opinion in the *Martinez* case and concluded that the dissent misunderstood the Court’s application in the *Zadvydas* case.173 The issue in *Zadvydas* had been whether removable aliens could be held indefinitely, and

165. *Id* (referring to the Court’s decision in *Zadvydas* v. Davis, 533 U.S. 678 (2001)).
166. *Martinez*, 543 U.S. at 386.
167. *Id*.
168. *Id.* at 378 (citing *Zadvydas*, 583 U.S. at 699).
170. *Id.* at 378 (citing *Zadvydas*, 583 U.S. at 701).
172. *Id.* at 378-79.
173. *Id.* at 379.
the Court held that they could not be.174 The Court explained its decision by saying that "the statutory text provides for no distinction between admitted and nonadmitted aliens" and that therefore "it results in the same answer."175 Justice Scalia pointed out that the dissenting opinion in Zadvydas actually supported the majority’s decision in Martinez because the dissent in Zadvydas argued that:

"[T]he majority's logic might be that inadmissible and removable aliens can be treated differently. Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility. As a result, it is difficult to see why [a]liens who have not yet gained initial admission to this country would present a very different question."176

The dissent in Zadvydas had voiced concern that the release of Mariel Cubans and other inadmissible illegal aliens would be a consequence of the majority’s interpretation, and the majority did not refute this.177

Justice Scalia went on to explain that while the government argued that statutory concerns which were present in Zadvydas were not present for aliens such as the defendants in Martinez, who had not been admitted to the United States, it did not justify the Court giving a different meaning to the statute to aliens such as the defendants.178 Justice Scalia also examined the concept of the "canon."179 Justice Scalia explained that the canon allows courts to avoid constitutional questions and is a means of giving effect to

174. Id.
175. Id.
176. Martinez, 543 U.S. at 379-80 (referring to Justice Kennedy’s dissent in Zadvydas, 583 U.S. at 710-11).
177. Martinez, 543 U.S. at 380.
178. Id. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." Id.
179. Id. at 381-82.
Congress' intent; and when a litigant utilizes the canon he is vindicating his own statutory rights and not the rights of others.\textsuperscript{180} The dissent relied on the decision in \textit{Crowell v. Benson}, where the Court had held that while a statute could be read to bar judicial review altogether, it could also be subject to a narrower reading.\textsuperscript{181} The Court in that case chose the narrower reading in order to avoid the constitutional questions that a preclusion of judicial review would have raised.\textsuperscript{182} The dissent in \textit{Martinez} had also relied on other cases and Justice Scalia in the majority opinion addressed these assertions. In pointing to \textit{Raygor v. Regents of Univ. of Minn.} and \textit{Jinks v. Richland County}, the dissent was trying to establish that § 1367(d) had two meanings, and that this line of reasoning was "equivalent to the unlimited-detention/limited-detention meanings of § 1231(a)(6) urged upon us here."\textsuperscript{183} The majority in \textit{Martinez} explained that this case was different from the others because the defendant aliens in this case were asking only that § 1231(a)(6) as it was interpreted in \textit{Zadvydas} be applied to their case as well.\textsuperscript{184} Justice Scalia stressed that "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as \textit{a means of choosing between them}."\textsuperscript{185} Justice Scalia emphasized that in \textit{Zadvydas}, the statute had not been read to avoid approaching a constitutional limit, but the text of the statute had been read in regards to its purpose, and the rule was that the Secretary

\textsuperscript{180} \textit{Id.} (referring to the canon the Court explained: "It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts... The canon is thus a means of giving effect to congressional intent, not of subverting it."). \textit{Id.}

\textsuperscript{181} \textit{Martinez}, 543 U.S. at 382-83 (referring the Court's decision in \textit{Crowell v. Benson}, 285 U.S. 22 (1932)).

\textsuperscript{182} \textit{Id.} at 382-83.

\textsuperscript{183} \textit{Martinez}, 543 U.S. at 383 (referring to the Court's decisions in \textit{Jinks v. Richland County}, 538 U.S. 456 (2003) and \textit{Raygor v. Regents of Univ. of Minn.}, 534 U.S. 533 (2002)).

\textsuperscript{184} \textit{Martinez}, 543 U.S. at 385.

could detain aliens only as long as needed to effectuate their removal from the United States.\textsuperscript{186}

The majority addressed the government’s argument that § 1182(d)(5)(A) could permit continued detention of aliens.\textsuperscript{187} Upon examination of the statute, the Court found that the provision did not authorize indefinite detention.\textsuperscript{188} The government had also expressed fears that the safety of U.S. borders could be compromised if inadmissible aliens were to be released into the United States who were not removable.\textsuperscript{189} The Court’s response to this was that if this was a fear that Congress had, then they could properly address it.\textsuperscript{190} The Court explained that it could not permit unlimited detention

\textsuperscript{186} \textit{Martinez}, 543 U.S. at 385.

\textsuperscript{187} \textit{Id.} at 385-86.

\textsuperscript{188} \textit{Id.}

The [Secretary] may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the [Secretary], have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

\textit{Id.} at 386 n.7.

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Martinez}, 543 U.S. at 386 n.7.

That Congress has the capacity to do so is demonstrated by its reaction to our decision in \textit{Zadvydas}. Less than four months after the release of our opinion, Congress enacted a statute which expressly authorized continued detention, for a period of six months beyond the removal period (and renewable indefinitely), of any alien (1) whose removal is not reasonably foreseeable and (2) who presents a national security threat or has been involved in terrorist activities. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), § 412(a), 115 Stat. 350 (enacted Oct. 26, 2001) (codified at 8 U.S.C. § 1226a(a)(6) (2000 ed., Supp. II)).

\textit{Id.} at 386 n.8.
because it could lead to a dangerous presumption that judges could "give the same statutory text different meaning in different cases."\textsuperscript{191}

In conclusion, the majority in \textit{Martinez} decided that since the government failed to give a reason why the time to carry out removal of an inadmissible alien would take longer than the six-month period recommended in \textit{Zadvydas}, the six-month period would apply to this case.\textsuperscript{192} The defendants in this case had already been detained six months past the time when their final removal orders had been issued.\textsuperscript{193} In addition to this, the government had not indicated there was a substantial likelihood that the defendants would eventually be removed.\textsuperscript{194} Therefore, the Court granted both petitions for habeas corpus and affirmed the judgment of the 9\textsuperscript{th} Circuit, reversed the judgment of the 11\textsuperscript{th} Circuit, and remanded both cases.\textsuperscript{195}

\textit{C. Concurring Opinion: Justice O'Connor}

In her concurring opinion Justice O'Connor gave the government some encouraging advice, stating that even under the current statutes, the government could still detain inadmissible aliens for longer than the six-month period after their removal had been ordered.\textsuperscript{196} She explained that the Court's presumption in \textit{Zadvydas} had been just that, a "presumption."\textsuperscript{197} Under § 1231(a)(6), if the government was able to show that a time period extending beyond the six-month period was "reasonably necessary" to remove the inadmissible alien, then further detention would be lawful under the statute and the holding in \textit{Zadvydas}.\textsuperscript{198}

Justice O'Connor also suggested that there may be other means under statutes in which the government could detain aliens whose removal from the United States was not foreseeable, but whose

\textsuperscript{191} \textit{Id.}  
\textsuperscript{192} \textit{Id.}  
\textsuperscript{193} \textit{Id.}  
\textsuperscript{194} \textit{Id.}  There were no longer repatriation negotiations going on between the U.S. and Cuba, so therefore the petitions for habeas corpus should have been granted. \textit{Id.}  
\textsuperscript{195} \textit{Martinez}, 543 U.S. at 386-87.  
\textsuperscript{196} \textit{Id.} 387-88 (O'Connor, J., concurring).  
\textsuperscript{197} \textit{Id.} at 387.  
\textsuperscript{198} \textit{Id.}
presence within the country nonetheless could pose a security risk. Under §§ 1226(a)(3) and (a)(6), the Secretary of Homeland Security could detain an alien who threatens national security and the United States community. Also, if it is proven that the Secretary has "reasonable grounds to believe" an alien has engaged in a dangerous activity or terrorist activity, the alien may be detained under the statute.

Along with these other statutes, Justice O'Connor made it clear that even though aliens would be entitled to release under the Court's ruling in Martinez, they were still subject to conditions of supervised release. If an alien failed to comply with the conditions of his release, he could be subject to criminal penalties which could include further detention. Justice O'Connor emphasized this right of Congress to regulate by quoting from Zadvydas: "We nowhere deny the right of Congress . . . to subject [aliens] to supervision within conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." Overall, Justice O'Connor's concurrence pointed out that even though the Court's ruling had entitled inadmissible aliens who had been detained beyond the removal period with no foreseeable removal in sight to release, the government still had tools in their hands to regulate and monitor the release of those aliens.

D. Dissenting Opinion: Justice Thomas (Chief Justice Rehnquist joins in Part I-A)

Justice Thomas began by explaining that § 1231(a)(6) permitted an alien who had been ordered removed by the Secretary of Homeland Security to "be detained beyond the removal period."

199. Id.
200. Id.
203. Id. at 387-88 (referring to 8 U.S.C. § 1253(b) (2005)).
204. Id. at 388 (quoting Zadvydas, 533 U.S at 695).
205. Martinez, 543 U.S. at 397-88.
206. Id. (Thomas, J., dissenting) (quoting 8 U.S.C. § 1231(a)(6) (2005)).
Justice Thomas pointed out that in the *Zadvydas* decision, the Court had interpreted this provision to mean a "reasonable" amount of time regarding the detention of aliens because an "indefinite" detention would lead to "serious constitutional concerns" for the Court. The Court had also conceded that aliens who were inadmissible to the United States would pose a different matter. The majority in *Martinez* decided that the distinction mentioned in the *Zadvydas* case was really irrelevant because § 1231(a)(6) applied in the same way to all three classes of aliens. Justice Thomas stressed that since the *Martinez* case could not be reconciled with the Court's decision in *Zadvydas*, *Zadvydas* should be overruled, and therefore he dissented.

The dissent began by interpreting the majority's decision in the *Zadvydas* case. The dissent argued that the Court's decision in that case was driven by the "lowest common denominator principle." Due to the constitutional concerns that indefinite detention could raise, the Court decided to read the statute to permit the Attorney General (now the Secretary of Homeland Security) to detain admitted aliens as long as "reasonably necessary" to carry out their removal. The Court in *Zadvydas* did not decide whether the holding would also apply to aliens who had not been admitted into the United States, but did acknowledge that there were constitutional distinctions between the two groups of aliens.

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207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* (referring to the majority's opinion in *Zadvydas*, 533 U.S. 679 (2001)).

The majority strains to recharacterize *Zadvydas* because it thinks that "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." ... In other words, it claims, "[t]he lowest common denominator, as it were, must govern."... I disagree.

*Id.* at 392. (referring to the Court's decision in *Zadvydas*) (citation omitted).
213. *Id.* at 389. (referring to § 1231(a)(6)).
214. *Id.* at 389-90.
Justice Thomas urged the Court in *Martinez* to adopt the two-step procedure it had used in the *Zadvydas* case and to apply it to the *Martinez* case.\(^{215}\) Using this approach the Court would first ask if the statute was ambiguous and if it was, then it would ask whether one of the possible interpretations of the statute would raise constitutional doubts when applied to the alien's case.\(^{216}\) The dissent argued that while the Court may have concerns about creating a statute rather than interpreting one, there should not be a single and unchanging meaning of § 1231(a)(6).\(^{217}\) Instead, the application of the detention period authorized should depend on the circumstances of the alien's removal and the type of alien being removed.\(^{218}\)

The dissent was bothered by the majority's attempt to "recharacterize" the decision made in *Zadvydas*.\(^{219}\) It argued that the Court was simply using the "lowest common denominator" in making its decision, without giving support for its rationale.\(^{220}\) The dissent pointed to *Jinks v. Richland County* used by the majority, and said that in *Jinks* the Court conceded that it reached its holding after looking at constitutional doubts that were at issue.\(^{221}\) The dissent argued that as in the *Jinks* case, the Court in *Martinez* should look at the constitutional concerns that justified applying the ruling made in *Zadvydas* to inadmissible aliens.\(^{222}\) The dissent also referred to *Salinas v. United States* where the Court had rejected the idea that a federal bribery statute should be read to avoid constitutional doubts because there was "no serious doubt about the constitutionality" of the statute when applied to that case.\(^{223}\) In *Salinas*, there were no constitutional issues being contended, only the statute, so the Court was mistaken in believing that *Salinas* was a "rejection of a constitutional argument on its merits."\(^{224}\)

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215. *Id.* at 391.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 392.
220. *Id.*
221. *Id.* at 393. (referring to *Jinks v. Richmond County*, 538 U.S. 456 (2003)).
223. *Id.* (referring to *Salinas v. United States*, 522 U.S. 52 (1997)) (emphasis added by the Court).
Justice Thomas also stressed that the Court’s use of the “lowest common denominator” principle was at odds with the history of the canon of avoidance, which could lead to “mischievous consequences.” The dissent argued that the majority was speaking of the *modern* canon of avoidance, where in order to avoid constitutional questions, the courts would construe ambiguous statutes. In contrast, the *traditional* avoidance canon involved a doctrine where courts would choose a constitutional reading of the statute over an unconstitutional one – not simply reading the statute to avoid the constitutional issues. 

The dissent urged the Court to apply constitutional adjudication when deciding whether a statute would raise “serious constitutional doubts.”

The dissent also pointed out that because § 1231(a)(6) was given such a narrow reading in *Zadvydas*, that the statute limited the Executive’s power to detain aliens not admitted to the United States for an indefinite period of time, although indefinite detention in some cases could be constitutional. The dissent relied on *Leocal v. Ashcroft*, which permitted “lenity” to apply to a statute “so long as they have some criminal applications.” The Court also referred to other cases regarding lenity and stated that *Zadvydas* presented constitutional doubt as to whether § 1231(a)(6) applied to himself and not a hypothetical application to aliens. The dissent said that it did not want a court applying a canon of constitutional doubt to a statute that was clear on its face.

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225. *Id.*

226. *Id.*

227. *Id.* The dissent also pointed out that the “lowest common denominator principle” would permit a way around black-letter law for constitutional facial attacks: that a litigant is generally not allowed to “attack statutes as constitutionally invalid” due to other litigants or facts. *Id.* at 396.

228. *Martinez*, 543 U.S. at 397. “Moreover, the reason that courts perform avoidance at all, in any form, is that we assume ‘Congress intends statutes to have effect to the full extent the Constitution allows.”’ *Id.* (quoting United States v. Booker, 543 U.S. 220 (2005)).

229. *Id.*

230. *Id.* (referring to *Leocal v. Ashcroft*, 543 U.S. 1, 12, n.8).


232. *Id.* at 399.
In *INS v. St. Cyr*, the Court held the Immigration and Nationality Act (INA) did not divest district courts' jurisdiction under 28 U.S.C. § 2241 in habeas corpus actions which were filed by criminal aliens trying to challenge removal orders. Since the case had only involved criminal aliens, the dissent argues that one would think that noncriminal aliens would have to go to the court of appeals to petition for review rather than "sue directly under the habeas statute." But in practice, lower courts using the Court's "lowest common denominator" principle have held differently in that they have "entertained noncriminal aliens' habeas actions challenging removal orders." Justice Thomas responded to this by saying: "[t]he logic in allowing noncriminal aliens, who have a right to judicial review of removal decisions, to take advantage of constitutional doubt that arises from precluding any avenue of judicial review for criminal aliens... escapes me."

The dissent concluded by stating that the Court had been wrong to give the *Zadvydas* case a stare decisis effect. Justice Thomas wrote that the case was wrong on both its statutory and constitutional analysis. He argued that just because Congress can overturn the Court's cases by statute, did not mean that the Court could not overrule a statutory precedent that was wrong. The dissent also stressed that Congress in enacting the statute had not meant to limit the Secretary's ability to detain aliens. Congress had enacted § 1226(a)(6) in 2000 in response to the *Zadvydas* case, but is only operated within *Zadvydas* boundaries. Therefore, Justice Thomas

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233. *Id.* at 400 (referring to INS v. St. Cyr, 533 U.S. 289, 327-36 (2001)).
234. *Id.* at 399-400. (referring to *St. Cyr*, 533 U.S. at 335).
235. *Id.* at 401. (referring to Chmakov v. Blackman, 266 F.3d 210, 214-15 (C.A. 3d. 2001)).
236. *Martinez*, 543 U.S. at 400-01.
237. *Id.* at 401.
238. *Id.*
239. *Id.*
240. *Id.* at 402-03.
241. *Id.* at 404.

Section 1226a(a)(6) authorizes detention for a period of six months beyond the removal period of aliens who present a national security threat, but only to the extent that those aliens' removal is not reasonably foreseeable... Yet *Zadvydas* conceded
concluded that in the *Martinez* case he would have affirmed the Judgment of the Eleventh Circuit and reversed the judgment of the Ninth Circuit.\textsuperscript{242}

**V. IMPACT AND SIGNIFICANCE**

After the *Zadvydas* decision, there were relevant concerns over the safety and welfare of the general population. In *Demore v. Kim*, a decision after *Zadvydas*, the Court examined a defendant's habeas corpus petition challenging "the statutory framework that permits his detention without bail."\textsuperscript{243} The Court closely looked at Congress' concerns and found out that the concerns were justified by statistical evidence.\textsuperscript{244} One study estimated the fastest growing group in prison was criminal aliens, who constituted around 25% of prisoners in federal prisons.\textsuperscript{245} Another study had suggested it would take twenty-three years for the INS to deport "every criminal alien already subject to deportation" and that even if criminal aliens were successfully deported, there was a high likelihood they would return illegally.\textsuperscript{246} Other problems the INS faced were that illegal aliens were taking up immigration opportunities which should be available that indefinite detention might not violate due process in "certain special and narrow nonpunitive circumstances ... where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint."... Moreover, *Zadvydas* set a 6-month presumptive outer limit on the detention power. ... Congress crafted § 1226a(a)(6) to operate within the boundaries *Zadvydas* set. This provision says nothing about whether Congress may authorize detention of aliens for greater lengths of time or for reasons the Court found constitutionally problematic in *Zadvydas*.

\textit{Id.} (citations omitted).

\textsuperscript{242} \textit{Id.} at 404.


\textsuperscript{244} \textit{Id.} at 518. "[T]he Chief Justice concluded that rules of immigration are intertwined with national security concerns, and since detention during removal proceedings is part of immigration rules, due process standards that would be unacceptable for citizens are legitimate." Eli J. Kay-Oliphant, \textit{Considering Race in American Immigration Jurisprudence}, 54 EMORY L.J. 681, 694 (2005).

\textsuperscript{245} *Demore*, 538 U.S. at 518.

\textsuperscript{246} \textit{Id.}
to legal immigrants, and that if deportable criminal aliens remained in the United States they would often commit more crimes before the INS had a chance to remove them.\footnote{247} Congress had evidence that part of this problem was exacerbated by the fact that the INS could not detain criminal aliens while their deportation proceedings were taking place.\footnote{248} If they were released, 20\% of criminal aliens subject to deportation would not appear at the removal hearings and this further hampered the process of removal.\footnote{249} In light of these studies and statistics, it is not surprising there are those who are greatly concerned over the impact that the decision made in \textit{Martinez} will have on society and safety in the United States.

The United States has often been characterized as a safe haven and place of escape for weary and persecuted immigrants. Throughout much of its modern history, the United States has experienced several waves of immigrants from various countries at different times. Despite its desire to have an open-door policy, the United States faces various threats and concerns for its safety.

In the post-September 11\textsuperscript{th} era, the United States is faced with protecting its borders and protecting its citizens from outside threats. The events of September 11\textsuperscript{th} have had an impact on U.S. immigration policy, as well as current legislation from U.S. leaders. Recently, the Congress enacted the Patriot Act and other such measures to ensure safety. The Court’s decision in \textit{Martinez} will undoubtedly affect the fate of many inadmissible aliens who have been detained beyond the six month removal period, but who cannot be removed for political or other reasons.\footnote{250}

In the majority opinion Justice Scalia suggested that the nation’s border concerns can be addressed by Congress.\footnote{251} After \textit{Martinez}, the government is no longer permitted to detain after the period beyond the removal order has expired, if removal is no longer reasonably foreseeable.\footnote{252} The decision will have an impact on all three categories of aliens: (1) those who were legally admitted, (2)
those who arrived illegally, and (3) those who were never technically allowed in and who were stopped at the border.\textsuperscript{253} For many years the Court had maintained a distinction between aliens who had been stopped at the border and those who had entered legally or illegally – the \textit{Martinez} case makes this distinction less clear.\textsuperscript{254}

Some believe that the decision in \textit{Martinez} may have come out in favor of inadmissible aliens currently in custody of the Department of Homeland Security (DHS).\textsuperscript{255} It has been estimated that there are currently about 2,270 inadmissible aliens in the custody of the DHS.\textsuperscript{256} However, this decision by the Court may not have been a complete victory for these inadmissible aliens because the Court had "hinted that it would uphold a revision of the relevant statute which would allow indefinite detention of inadmissible aliens."\textsuperscript{257} It is estimated that during the Mariel Boatlift approximately 122,000 Cubans were paroled in the Spring of 1980 and Summer of 1981.\textsuperscript{258}

Although for now it seems that the DHS will have to release inadmissible aliens who have been detained beyond the removal period with no foreseeable removal, the Court in \textit{Martinez} seemed to make itself very clear that if the statute had made a "clearer distinction" between the groups of aliens, then the outcome could be very different.\textsuperscript{259} Therefore, any gain in protections the inadmissible aliens may have made, could easily be taken away if there are revisions in the existing statute which make Congress' intent clearer on the issue.\textsuperscript{260}

After September 11\textsuperscript{th}, there were various responses by the government and many of them had a great impact on U.S.

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 506.
\item \textit{Id.}
\item \textit{Id.} at 507.
\item \textit{Id.} at 518-19.
\item \textit{Id.} at 520.
\end{enumerate}
Congress passed the USA PATRIOT Act, signed by President Bush on October 26, 2001. "The Act provides express statutory authority to detain for additional six-month periods beyond the ninety-day removal period if 'removal is unlikely in the reasonably foreseeable future,' but only if release 'will threaten the national security of the United States or the safety of the community or any person.'" The Act also provides that every six months the Attorney General would review certification and that the Act could be challenged on federal habeas corpus grounds. Despite the security concerns the United States now faces, the Court's decision in Clark v. Martinez may be a sign that the "Court [will] not [be] paralyzed by claims of national security," This is important because it seems that while the executive branch and legislative branch of government may be greatly concerned about the current uncertainty of terrorist threats, the judicial branch may not be succumbing to possible pressure by these two other branches of government. The Court, for now, has seemed to take the position that if an actual threat does exist, then the government may act on it. However, the Court has refused to give the government unbridled discretion in detaining inadmissible aliens by using the terrorist threat excuse.

However, even though the Court in Clark v. Martinez may have found that national security argument was not a compelling reason to warrant extended detention of non-removable inadmissible aliens in that case, there are still challenges that many detainees face. In the

262. Id. at 830.
263. Id.
264. Id. While challenges may be made on federal habeas corpus grounds, all of the appeals are required to go through the District Court for the District of Columbia. Id.
265. Id. at 860.
266. Id.
267. Id.
case of aliens who are ordered removed but cannot be repatriated to their home countries they are often faced with a difficult choice. Presented with the ‘choice’ between (1) accepting an order of removal with the limited possibility of deportation at some unknown future date, or (2) enduring continued detention for as long as they resist the government’s attempts to obtain a removal order.”

Some have worried that this choice leads the government to pressure aliens who have been ordered removed, but who cannot be removed, to accept removal orders. The government’s strategy for doing this would be beneficial for the government because (1) if an alien fought to retain their permanent resident status, they would prolong their detention, and (2) since the aliens cannot be removed, accepting a removal order would not have any real consequences.

However, the circuit courts may be giving aliens in this position some hope.

In Ly v. Hansen, the Court found that a reasonableness requirement should apply for an alien held in detention for removal proceedings who could not be removed from the United States, even if he was ordered removed. As a result, the Sixth Circuit held that the Zadvydas case should apply to situations where removal would not be “achievable” rather than having Kim apply. While this may have provided some hope for aliens who were not really removable, the events of September 11, 2001 and the changes in immigration laws may pose more challenges for aliens who are in this position.

Besides the September 11th response, there was also a response by the government after the Zadvydas decision came down. It was clear that the government was not happy with the Court’s decision

269. Id. An example of aliens who would be faced with this dilemma are aliens from Laos and Vietnam because the United States does not have repatriation agreements with those countries and cannot carry out a removal order. Id.
270. Id. at 232.
271. Id. at 239.
272. Id. at 239-40.
273. Id. at 240.
274. Lyons, supra, note 268 at 240 (referring to Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).
275. Id. (referring to Zadvydas, 533 U.S. 678 and Kim, 538 U.S. 510).
276. Id. at 244.
277. Carey, supra note 1, at 29.
because soon after the decision, Attorney General John Ashcroft released a statement which explained that there was an urgency to deport aliens because “their history of serious crime makes them a threat to our community.”

The American Civil Liberties Union (ACLU) was not pleased with this statement because it felt that Ashcroft was making all indefinite detainees look like “dangerous criminals.”

Ashcroft soon developed a response to the Zadvydas decision and made his first priority in the matter to pressure the home countries of the inadmissible removable aliens to accept the aliens back and repatriate them. The second response was to see if any of the aliens in detention had sentences they had not served yet, or whether more charges could be brought against these aliens in custody. In the process of exploring various options in the July 19th Memorandum from Ashcroft, he created “two loopholes in Zadvydas.” Two possible reasons for continued detention that would still be permitted under Zadvydas were “special circumstances” or “reasonable efforts to remove the alien [were] still underway.” It appears that the government is trying to come up with a way in which it can still detain these inadmissible non-removable aliens, while still operating within the framework the Court has set up in the Zadvydas case.

This interpretation of Zadvydas has had different effects in the lower courts. The United States District Court for the Southern District of New York chose to deny a petitioner’s writ of habeas corpus when it determined that the alien’s removal from the United States “appear[ed] to be imminent.” In contrast, the United States

278. Id. at 30-31.
279. Id. at 31.
280. Id.
281. Id. at 33.
282. Id.
283. Id.
284. Id. at 34-38.
285. Id. at 35. (referring to Lawrence v. Reno, No. 00 Civ. 4559 (LAK), 2001 U.S. Dist. LEXIS 9953 (S.D.N.Y. July 18, 2001). In the Lawrence case, the court did acknowledge that he had been in custody for a long time and that part of the delay in his case was due to “administrative error.” Id. Despite this, it held that
District Court for the District of Rhode Island found that the petitioner did not fall into the loophole and granted the writ. The District Court of Massachusetts also refused to let a petitioner fall into the loophole and held that the writ would be issued if the petitioner had not been repatriated within the sixty day period. The results of these cases demonstrate that there is indeed a difference in how the lower courts are interpreting these possible "loopholes" and if they are permitting them to be utilized. This difference in interpretation may pose more questions and problems in the near future as the government continues to find ways to protect national security and U.S. borders while trying to operate within the Court's rulings.

After Clark, the government and American public are faced with a growing dilemma. Mainly, what is to be done with inadmissible aliens who have been ordered removed but who are found to be non-removable from the United States. Often, the inability to remove aliens who have been ordered removed are due to political and repatriation reasons. While Ashcroft may have found two potential loopholes in the Zadvydas decision, this solution may not be indefinite. Another possibility is that Congress could go back and clarify §1231(a)(6) so that Congress' intent would be clear, and the Court would not have to interpret the statute. Overall, it seems that since removal might be "imminent", Lawrence could not escape the Zadvydas loophole.

286. Id. (referring to Sylvanus Emmanuel Williams, Sr. v. INS, No. 01-043 ML., 2001 WL 1136099 (D.R.I., Aug. 7, 2001). Williams was from the Bahamas and the court found that he did not fall into the loophole because he had already been in custody for twenty months. Id. It found that the government had shown no signs or offered a time period when his deportation would take place. Id. Therefore, it found that "continued detention of Williams is unreasonable, excessive, and 'shocks the conscience' in violation of the substantive component of the Fifth Amendment's due process clause." Id. (quoting Sylvanus Emmanuel Williams, Sr. v. INS, No. 01-043 ML., 2001 WL 1136099 (D.R.I., Aug. 7, 2001)).


289. Carey, supra note 1, at 30-33.

the U.S. government is faced with a dilemma, but it has tools it can use to correct it and protect the American public if it feels that is what is necessary.

VI. CONCLUSION

Clark v. Martinez in effect did expand the Court's holding in Zadvydas v. Davis. The ruling extends the holding in Zadvydas to permit inadmissible aliens to be released if they are held beyond the removal period with no foreseeable opportunity to be removed from the United States. Although this may be deemed as a victory for inadmissible aliens ordered removed, it is a very fragile victory. Measures have been enacted since the Zadvydas decision to create loopholes where further detention of aliens can take place. Undoubtedly, human rights advocates and other organizations, as well as aliens themselves will be watching closely to see what becomes of the inadmissible non-removable aliens who are currently in custody.

The government seems to have legitimate concerns of public safety and welfare. There seem to be statistics and evidence that aliens who entered the United States illegally and who have committed crimes will likely act out again in the future. There are also statistics which have shown that a substantial number of inmates currently in custody are aliens, many of which may also have been aliens who were never formally paroled into the United States or who have entered the United States illegally. However, as demonstrated in the Martinez case, the Court will not always find that this is a sufficient justification for continued detention.

In Martinez, the Court decided the case based on a statutory reading of the text. It has left the door open for Congress to take care of the issue by stating that Congress does possess the power to

293. Id.
294. Carey, supra note 1, at 31.
297. Id. at 380.
amend the statute.\textsuperscript{298} Since the constitutional issues of the case have not been addressed, this may be something the Court will have to decide in the future. If Congress does decide to change or amend the statute, then the constitutionality of that statute may also come before the Court. It will be interesting to see if Congress will take steps to further protect the American public from the release of inadmissible, non-removable aliens who have committed crimes. It may also be interesting to see if anyone tracks the progress of the inadmissible non-removable aliens who are released back into society.

The \textit{Martinez} case is one which must balance the two competing groups of human rights and public safety.\textsuperscript{299} There is evidence which has been presented to suggest that aliens do comprise a substantial part of the U.S. prison population.\textsuperscript{300} If an inadmissible removable alien cannot be removed due to political or other reasons, then according to \textit{Martinez}, they will have to be released. While not all aliens in this category pose a threat to society, there is a legitimate fear that once aliens who do pose a threat are forced to be released, they will again commit crimes and cause a danger to public safety.

If the U.S. public and its leaders are genuinely concerned for the safety of the American public, then the Court’s decision in \textit{Martinez} should inspire them to take action. However, it may be that the release of these inadmissible non-removable aliens may have little or no effect on American society at large. On the other side of the debate, it is reasonable to suspect that the families of the victims of the aliens who committed these crimes will undoubtedly be upset about the release of these aliens back into society.

For some, the Court’s decision in \textit{Clark v. Martinez} may not come as a surprise. The decision may be viewed as simply extending the Court’s ruling in the \textit{Zadvydas} case to inadmissible aliens who

\textsuperscript{298} Id.

\textsuperscript{299} Jose Javier Rodriguez, Comment, Clark v. Martinez: Limited Statutory Construction Required By Constitutional Avoidance Offers Fragile Protection for Inadmissible Immigrants from Indefinite Detention, 40 Harv. C.R.-C.L. L. REV. 505, 521-22 (2005). “In the current political climate where the line between matters of national security and matters of immigration is often blurred, the urgency of strengthening protections of the rights and liberties of immigrants only grows.” \textit{Id.}

\textsuperscript{300} Demore v. Kim, 538 U.S. 510 (2003).
have no future hope of being removed from the United States.\textsuperscript{301} However, there may be some who believe that the fact that the aliens were inadmissible, as opposed to admissible, does make a fundamental difference in whether they should be permitted to be released back into the American public. Despite any personal views or objections that people may have, it must be pointed out that even inadmissible aliens are afforded the protections of the U.S. Constitution.\textsuperscript{302} As mentioned earlier in this note, the Fifth and Fourteenth Amendments do ensure that even inadmissible aliens should be afforded due process rights.\textsuperscript{303}

Presently, it seems that Ashcroft and the INS have found certain loopholes within the framework to operate in until further action is taken.\textsuperscript{304} However, there is also evidence that there may be a certain amount of uncertainty amongst the lower courts.\textsuperscript{305} For now it appears that there have been no major challenges to the Court's decision in \textit{Martinez}, but it does not mean that challenges will not occur in the future. The challenge may come from the government in the form of a court case, or it may come in the form of new or amended legislation. Although the \textit{Martinez} decision may be seen by some as a victory for the many inadmissible non-removable aliens who are currently in custody, it is unclear whether the victory will last. It appears that at least for now, the American public and aliens who are currently in jeopardy under the statute will have to wait together to see what the future holds.

\textsuperscript{301} \textit{Martinez}, 543 U.S. at 372-73.  
\textsuperscript{302} See U.S. CONST. amend. V., U.S. CONST. amend. XIV, § 1.  
\textsuperscript{303} See infra notes 25-30.  
\textsuperscript{304} Carey, supra note 1, at 30-33.  
\textsuperscript{305} See infra notes 284-87.