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# Striking a Balance: The Conflict between Safety and Due Process Rights—The Practical Implications of *Zadvydas v. Davis*

Alicia Brown\*

“Life without liberty is like a body without spirit.”<sup>1</sup>

“Justice delayed is justice denied.”<sup>2</sup>

“Of all the powers of government, the power to incarcerate is second only to the power to take a life.”<sup>3</sup>

## I. INTRODUCTION

Picture this: your child is murdered by a resident alien in the United States. The alien serves his sentence, and the United States wishes to deport him. However, no country will take the alien back. Do you want the alien released back into the general population of the United States? Conversely, place yourself in the position of the alien. He has served the sentence given to him, yet no country will take him in. Should he be forced to wait in jail indefinitely when

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1. Kahlil Gibran, at [http://www.quoteland.com/author.asp?AUTHOR\\_ID=79](http://www.quoteland.com/author.asp?AUTHOR_ID=79) (last visited Nov. 13, 2002).

2. William E. Gladstone, at [http://www.quoteland.com/topic.asp?CATEGORY\\_ID=88](http://www.quoteland.com/topic.asp?CATEGORY_ID=88) (last visited Nov. 13, 2002).

3. *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1841 (2002).

deportation does not appear likely? How is the alien's interest in liberty to be balanced with the general population's interest in safety? The Supreme Court's ruling in *Zadvydas v. Davis*<sup>4</sup> affects how and when aliens who cannot be deported are released back into the United States. This note explores the *Zadvydas* decision. Part II details the facts and procedural history of the case.<sup>5</sup> Part III analyzes the majority opinion by Justice Breyer, as well as the dissenting opinions of Justices Scalia and Kennedy.<sup>6</sup> Part IV considers *Zadvydas*' legislative, judicial, administrative and social impact.<sup>7</sup> Part V concludes the discussion of *Zadvydas* and the immigration policy.<sup>8</sup>

## II. HISTORICAL BACKGROUND

### A. Precedential History

The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”<sup>9</sup> The Supreme Court has ruled that the Fifth Amendment's right of due process applies to aliens in deportation proceedings.<sup>10</sup> The debate over the past century has surrounded what rights due process entails, rather than if due process applies to aliens in deportation proceedings. This historical background will sketch a history of the

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4. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

5. See *infra* Part II and accompanying notes.

6. See *infra* Part III and accompanying notes.

7. See *infra* Part IV and accompanying notes.

8. See *infra* Part V and accompanying notes.

9. U.S. CONST. amend. V.

10. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that:

Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized).

development of due process rights as applied to aliens in deportation proceedings.

The Fifth Amendment does not require that people be citizens for due process rights to extend to them.<sup>11</sup> Therefore, aliens are entitled to due process rights in deportation proceedings.<sup>12</sup> In the pre-twentieth century United States, aliens were afforded considerably fewer rights than they are today.<sup>13</sup> A turning point in pre-twentieth century alien due process rights was the *Dred Scott* decision.<sup>14</sup> In that case, the Supreme Court ruled that the rights awarded in the Bill of Rights extended only to citizens of the United States.<sup>15</sup> The Court ruled that where the Constitution gave rights to people, the word "people" meant citizen.<sup>16</sup> The adoption of the Fourteenth Amendment gave non-citizens, including aliens, rights beyond which they had enjoyed prior to that point.<sup>17</sup> The Fourteenth Amendment stresses that non-citizens are entitled to the Fifth Amendment rights of due process.<sup>18</sup>

Early Supreme Court decisions on the rights of aliens "protected the interests of aliens without holding that they had constitutional rights."<sup>19</sup> At the time of early Supreme Court decisions, there was no

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11. See *Wong Wing v. United States*, 163 U.S. 228, 242 (1896) (holding that: The term "person," used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws).

12. *Yamataya*, 189 U.S. at 100.

13. See Jim Rosenfeld, Comment, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713 (1995) (providing a detailed discussion of colonial American treatment toward aliens and the development of alien rights in the United States).

14. *Scott v. Sandford*, 60 U.S. 393, 584-86 (1856).

15. *Id.*

16. *Id.*

17. Rosenfeld, *supra* note 13, at 728.

18. U.S. CONST. amend. XIV.

19. Rosenfeld, *supra* note 13, at 730.

federal deportation statute and states primarily handled deportations, so the Court did not use the Bill of Rights to award rights to aliens.<sup>20</sup> At the end of the nineteenth century, the Court began to hear cases on alien due process rights. In 1886, in the *Yick Wo v. Hopkins* case, the Court ruled that Fifth Amendment due process was given to anyone within the United States.<sup>21</sup> In *Wong Wing v. United States*, the Court ruled that aliens were persons under the Fifth Amendment, and so entitled to Fifth Amendment protection.<sup>22</sup>

In the 1880's and 1890's, the Court decided two important cases with regard to alien due process rights. In *Chae Chan Ping v. United States*, the Court ruled that the federal government had power over immigration cases.<sup>23</sup> In *Fong Yue Ting v. United States*, the Court ruled that the federal government had power over deportation cases.<sup>24</sup> The Court ruled in *Fong Yue Ting* that aliens were entitled to due process rights in their deportation hearings.<sup>25</sup> These two decisions

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20. *Id.*

21. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that “[t]he questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court”).

22. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that:

The term “person,” used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws).

23. *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889) (holding:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence).

24. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (holding that “[t]he power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments”).

25. *Id.* at 730.

awarded the federal government plenary power (total control) over alien deportation.

A new upsurge of alien due process cases arose during the mid-twentieth century. In *Harisiades v. Shaughnessy*, the Court ruled that the federal government retained the power to end an alien's stay in the United States.<sup>26</sup> In *Galvan v. Press*, the Court ruled that alien due process rights were not violated because Congress retained the power to regulate the deportation of immigrants.<sup>27</sup> In *Shaughnessy v. United States ex rel. Mezei*, the Court ruled that the Immigration and Naturalization Service ("INS") could keep a returning alien out of the United States without a hearing, and if the alien could not be deported, they could be detained indefinitely.<sup>28</sup> In the *Shaughnessy v. Pedreiro* case, the Court ruled that deportation orders could be reviewed in actions brought in federal district court under the Administrative Procedure Act ("APA").<sup>29</sup>

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26. *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 (1952) (holding that:

Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose).

27. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (holding that:

Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government).

28. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214-16 (1953).

29. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (holding that:

It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word "final" in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part. And it would

In more recent cases, beginning primarily in the 1970's, the Supreme Court has been moving away from plenary power and adopting "a new approach to the role of due process in all types of administrative hearings."<sup>30</sup> In 1982, the Court ruled in *Landon v. Plasencia* that aliens could invoke the Fifth Amendment Due Process Clause in deportation proceedings.<sup>31</sup> The Court handed down *United States v. Salerno* in 1987, ruling that government detention violates the Due Process Clause unless the detention occurs in a criminal proceeding with adequate procedural protections.<sup>32</sup> In 1992, the Court explained that detention in special, non-punitive situations would not violate due process, provided the government shows the detainee is mentally ill and dangerous.<sup>33</sup> The Court has also suggested that it may be unconstitutional for administrative body

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certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court).

30. Rosenfeld, *supra* note 13, at 737.

31. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (holding that:

In challenging her exclusion in the District Court, Plasencia argued not only that she was entitled to a deportation proceeding but also that she was denied due process in her exclusion hearing. We agree with Plasencia that under the circumstances of this case, she can invoke the Due Process Clause on returning to this country . . . ) (citation omitted).

32. *United States v. Salerno*, 481 U.S. 739, 751-52 (1987) (holding that:

Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. The Government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain[] (citation omitted)].

33. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). See also *Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997) (ruling that if there is a special justification, like mental illness, that outweighs an individual's interest against detention, the government is justified in detaining the individual.).

rulings to definitively rule regarding an individual's fundamental rights.<sup>34</sup> *Zadydas* was decided under these cases.

### B. Statutory Background

In 1952, Congress passed the Immigration and Nationality Act ("INA").<sup>35</sup> The INA allowed the Attorney General "either to detain or to release aliens during the six-month period following a final removal order."<sup>36</sup> In the 1980's and 1990's, Congress began legislating the detention and release of particular types of aliens more closely.<sup>37</sup> "Congress passed the Anti-Drug Abuse Act ("ADAA") of 1988, which required the detention of aliens convicted of an aggravated felony."<sup>38</sup> When several courts found that this mandatory detention violated the Due Process Clause, Congress amended the statute to allow the release of aliens who could prove they had entered the United States legally and were not a flight risk or dangerous.<sup>39</sup>

In response to the Oklahoma City bombings and the resulting increased fear of terrorism, Congress passed the Antiterrorism and

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34. Superintendent, Mass. Corr. Inst., *Walpole v. Hill*, 472 U.S. 445, 450 (1985) (stating that "[t]he extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law").

35. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

36. *Developments in the Law: Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1919 (2002) (citing 8 U.S.C. § 1252(c) (2000)). The article notes that prior to 1952, the Immigration Act of 1917 had governed "the removal and detention of aliens." *Id.* at 1919 n.26 (citing Immigration Act of 1917, ch. 29, 39 Stat. 874, which stated aliens were to be "taken into custody and deported"). The Immigration Act of 1917 was interpreted as allowing government detention of non-citizens "for a reasonable period of time." *Id.*

37. *Id.* at 1919-1921.

38. *Id.* at 1920 (citing Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) and § 7343(a)(4), 102 Stat. at 4470 (amending 8 U.S.C. § 1252(a) (2000)). The regulations required that the INS hold felonious aliens in custody during deportation proceedings and afterwards, until their removal. *Id.*

39. *Id.* (citing THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 886 (4th ed. 1998)).



Effective Death Penalty Act of 1996<sup>40</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>41</sup> which “amended the INA to subject a broader category of aliens to mandatory detention during removal proceedings and thereafter until repatriation.”<sup>42</sup> The amendments to the INA now require aliens removable as a terrorist threat to be detained, with exceptions for aliens in the witness protection program, or aliens who are not a flight or security risk.<sup>43</sup> Further, the amendments to the INA allow the government ninety days to remove an alien after a final order of repatriation.<sup>44</sup> However, some aliens are not removable within the ninety day period, so the INA allows the INS to continue detaining “excludable aliens and aliens who pose a danger to the community or represent a flight risk beyond the ninety day period.”<sup>45</sup> In 2001, after application of the INA’s 1996 rule expanding the types of aliens that can be detained pending repatriation, 3400 deportable aliens waited in U.S. prisons because their home countries refused to take them back.<sup>46</sup>

### C. Case History

#### 1. Zadvydas Case

*Zadvydas v. Davis* is the consolidation of two circuit court cases.<sup>47</sup> The first case is that of Kestutis Zadvydas, an immigrant from a displaced persons camp in Germany, who came to the United

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40. *Id.* (citing Pub. L. No. 104-132, 110 Stat. 1214 (1996)).

41. *Id.* (citing Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)).

42. *Developments in the Law: The Law of Prisons*, *supra* note 3, at 1920-21 (citing 8 U.S.C. § 1226(c) (2000)).

43. *Id.* at 1920-21 (citing 8 U.S.C. § 1226(c) (2000)).

44. *Id.* at 1921 (citing 8 U.S.C. § 1231(a)(1)(A) (2000)).

45. *Id.* (citing 8 C.F.R. § 241.14 (2002)).

46. *Id.* (citing Michelle Mittelstadt, *INS Plans To Free Long-Term Detainees: Home Countries Don't Want Immigrants Back*, DALLAS MORNING NEWS, July 20, 2001, at A1).

47. *Zadvydas v. Davis*, 533 U.S. 678, 684 (2001); *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1014 (E.D. La, 1997).

States in 1956.<sup>48</sup> Zadvydas had a long criminal conviction history, and in 1992, was convicted of a 1987 offense of possession of cocaine with intent to distribute in Virginia.<sup>49</sup> Zadvydas served two years, and immediately upon his release and probation, the INS took him into custody and began deportation proceedings.<sup>50</sup> The INS detained Zadvydas without bond, and at a bond hearing, Zadvydas was denied bond by an Immigration Judge, who reasoned that Zadvydas was a flight risk.<sup>51</sup> The Board of Immigration Appeals denied Zadvydas' appeal.<sup>52</sup> On March 29, 1994, Zadvydas' deportation hearing was held, and he was ordered deported to Germany.<sup>53</sup> The INS began proceedings to deport Zadvydas, but the German government told the INS that Zadvydas was not a German citizen, and that his parents were Lithuanian immigrants.<sup>54</sup> After discovering this information, the INS detained Zadvydas indefinitely (beyond the ninety-day removal period) because they could not find a country that would take him.<sup>55</sup> A magistrate judge recommended that Zadvydas' request for habeas corpus relief be denied on the grounds that indefinitely holding him pending deportation was constitutional, but the district court granted his writ of habeas corpus.<sup>56</sup> The INS appealed the judgment to the Fifth Circuit Court of Appeals.<sup>57</sup> The Fifth Circuit held that Zadvydas' continued

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48. *Zadvydas v. Davis*, 533 U.S. at 684. *See also* *Zadvydas v. Caplinger*, 986 F. Supp. at 1014 (E.D. La, 1997) (noting that Zadvydas' parents were from Lithuania, though it is not apparent whether they were Lithuanian citizens, and that Zadvydas was "admitted into the United States in connection with a program for the relocation of displaced persons").

49. *Zadvydas v. Caplinger*, 986 F. Supp. at 1014.

50. *Id.* at 1014-15 (noting that this was not the first time deportation proceedings were instituted against Zadvydas. In fact, the INS had begun deportation proceedings against him in 1977 after his 1966 conviction for attempted third degree robbery and his 1974 conviction for third degree attempted burglary).

51. *Id.* at 1015.

52. *Id.*

53. *Id.*

54. *Id.* The Lithuanian government also denied Zadvydas was a citizen of their country. *Id.*

55. *Id.*

56. *Id.*

57. *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999).

detention was not a violation of his due process rights as long as there were procedures to periodically review the detention and the possibility of his obtaining citizenship in another country was not obsolete.<sup>58</sup> Zadvydas asked the Supreme Court to review the Fifth Circuit's decision.<sup>59</sup> The Supreme Court granted certiorari and consolidated Zadvydas' case with Ma's, deciding them together.<sup>60</sup>

## 2. *Ma Case*

*Ma* was consolidated with *Zadvydas* by the Supreme Court.<sup>61</sup> In 1977, Kim Ho Ma was born in Cambodia.<sup>62</sup> Ma became a resident alien in the United States at age seven.<sup>63</sup> In 1996, Ma was convicted of first degree manslaughter by a jury, and sentenced to thirty-eight months in prison.<sup>64</sup> After twenty-six months, Ma was released, and the INS took him into custody and began removal proceedings against him.<sup>65</sup> The INS was not able to remove Ma within the ninety-

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58. *Id.* at 296-97. The court emphasized that there were "two other potential options . . ." for Zadvydas, that he could claim that he was German by birth, and therefore demand German citizenship, and that he could claim Russian citizenship. *Id.* at 293. The court found that since these two options had thus far gone unexplored, they left the INS with viable options other than permanently and indefinitely holding Zadvydas in custody, and therefore, the INS could hold him as long as "good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." *Id.* at 297. See also Charles Lane & Hanna Rosin, *Court Limits Detention of Immigrants; Justices Rule Convicts Can't Be Held Indefinitely*, WASHINGTON POST, June 29, 2001, at A1 (explaining that the Fifth Circuit analogized Zadvydas' situation to that of an illegal immigrant who has been detained at the border).

59. *Zadvydas v. Davis*, 533 U.S. at 686.

60. *Id.*; *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000).

61. *Zadvydas v. Davis*, 533 U.S. 678, 686 (2001).

62. *Id.* at 685.

63. *Id.* (noting that Ma's family fled Cambodia when he was two, and arrived in the United States in 1985 by way of refugee camps in Thailand and the Philippines). See *Ma v. Reno*, 208 F.3d 815, 819 (9th Cir. 2000) (noting that Ma became a lawful permanent United States resident in 1987).

64. *Ma*, 208 F.3d at 819 (noting that the manslaughter charge stemmed from a gang related incident).

65. *Id.* (noting that Ma was released early after "receiving credit for good behavior," that Ma was tried as an adult, though he was a minor at the time the crime was committed, and that the crime in question was Ma's only criminal

day period for removal, but they kept him in custody because they feared that Ma was a danger to others.<sup>66</sup> Ma filed for a writ of habeas corpus with the Federal District Court for the Western District of Washington in 1999.<sup>67</sup> The district court ruled that Ma had to be released because the Constitution does not allow “post-removal-period detention” unless there is a real possibility that the person being held will be deported, and there was no possibility in Ma’s case that he would be deported.<sup>68</sup> The INS appealed, and the United States Court of Appeals for the Ninth Circuit upheld Ma’s release.<sup>69</sup> The Ninth Circuit found that aliens could not be held for more than a reasonable time beyond the ninety-day detention period and that Ma had been held beyond a reasonable time.<sup>70</sup> The government asked the Supreme Court to review the Ninth Circuit’s decision, and the Court granted a writ of certiorari, and consolidated Ma’s case with *Zadvydas*.<sup>71</sup>

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conviction.) See *Zadvydas v. Davis*, 533 U.S. at 685 (noting that Ma was ordered removed because of his conviction for an “aggravated felony”). See, e.g., Cindy Rodriguez, *To Immigrant ‘Lifers,’ Prison Release is Overdue Many in New England Held in Diplomatic Limbo*, BOSTON GLOBE, Aug. 5, 2001 at B1 (discussing immigrants trapped in situations like that of Ma’s). The article details the situation of Anthony Budai and Nelson Davis, both immigrants who were convicted of crimes, and at the time the article was written, had served their sentence, but were being held indefinitely in prison beyond their sentence because the United States had been unable to deport them. *Id.* Budhai is a legal immigrant from Guyana who was convicted of attempted armed robbery, and served his four year sentence. *Id.* At the time the article was written, he had served six years, two extra years because the United States was unable to deport him. *Id.* Davis came to the United States as a child refugee from Cuba, and had been held seventeen months beyond his sentence because the United States has also been unable to deport him. *Id.*

66. *Zadvydas v. Davis*, 533 U.S. at 685-86 (noting that the INS was particularly disturbed by Ma’s gang membership and the violent nature of the crime he was convicted of).

67. *Ma v. INS*, 56 F. Supp. 2d 1165 (W.D. Wash. 1999).

68. *Zadvydas v. Davis*, 533 U.S. at 686 (noting that the district court found there was no possibility that Ma would be deported because the United States has no repatriation treaty with Ma’s home country, Cambodia).

69. *Ma*, 208 F.3d at 831.

70. *Id.* at 818, 830-31 (noting that the reasonable time expired after ninety days because the United States has no repatriation agreement with Cambodia).

71. *Zadvydas v. Davis*, 533 U.S. at 686 (noting the Court granted certiorari to Ma and *Zadvydas* to consider statutory and constitutional questions).

### III. ANALYSIS OF OPINION

#### A. *Majority*

Justice Breyer delivered the majority opinion for the court.<sup>72</sup> He began his analysis by explaining the removal process for aliens found to be in the United States illegally and ordered removed.<sup>73</sup> Justice Breyer explained that once an alien has been given a final order of removal, there is a ninety-day statutory removal period that the alien is typically removed during.<sup>74</sup> However, if the government is unable to remove the alien within the ninety-day period, there is a statute that allows the government to hold the alien longer.<sup>75</sup> The statute allows further detention of the alien if they are, “determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal . . . .”<sup>76</sup> The statute further says that if the alien is released, he can be subject to terms of supervision as a condition for his release.<sup>77</sup> Justice Breyer explained that the issue is whether the “post-removal-period statute . . . ” authorizes the Attorney General to indefinitely detain an alien beyond the ninety-day removal period, or if the statute only allows the Attorney General

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72. *Id.* at 682-702. Justice Breyer was joined in his opinion by Justices Stevens, O’Connor, Souter and Ginsburg. *Id.* at 681.

73. *Id.* at 682.

74. *Id.*

75. *Id.* (quoting 8 U.S.C. § 1231(a)(6) (2000)). “Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).” 8 U.S.C. § 1231(a)(1)(A) (2000).

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).

8 U.S.C. § 1231(a)(6) (2000).

76. *Id.* (quoting 8 U.S.C. § 1231(a)(6) (2000)).

77. *Id.* (citing 8 U.S.C. § 1231(a)(6) (2000)).

to retain the alien “for a period *reasonably necessary* to secure the alien’s removal.”<sup>78</sup>

Justice Breyer then addressed the procedures surrounding removal of an alien and the ninety day detention period.<sup>79</sup> He explains that once a final removal order has been issued, and the ninety day detention period begins, the alien must be held in custody.<sup>80</sup> After the ninety day period expires, the government still has the discretion to detain the alien, but is not required to.<sup>81</sup> Justice Breyer explained that the INS District Director reviews the alien’s history to decide whether further detention should be effected or whether they should be released under supervision once the ninety day detention period is up.<sup>82</sup> If the Director decides to detain the alien further, an INS panel will review the decision, following the passing of a three month period.<sup>83</sup> The panel then decides whether the alien should be further detained or released.<sup>84</sup> To release the alien, “the panel must find that the alien is not likely to be violent, to pose a threat to the community, to flee if released, or to violate the conditions of release.”<sup>85</sup> Justice Breyer states that if the panel decides to keep the suspect in custody, they must review their decision within a year, and can review it earlier upon a change of conditions.<sup>86</sup>

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78. *Id.* (italics in original).

79. *Id.* at 683. (stating “[t]he post-removal-period detention statute is one of a related set of statutes and regulations that govern detention during and after removal proceedings”).

80. *Id.* (citing 8 U.S.C. § 1231(a)(2) (2000)).

81. *Id.* (citing 8 U.S.C. § 1231(a)(6) (2000)).

82. *Id.* (citing 8 C.F.R. § 241.4(c)(1), (h), (k)(1)(i) (2002)).

83. *Id.* (citing 8 C.F.R. § 241.4(k)(2)(ii) (2002)).

84. *Id.* (citing 8 C.F.R. § 241.4(i) (2002)). The Court notes the factors laid out by 8 C.F.R. § 241.4(f)(2002) that the panel takes into account: “the alien’s disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties. *Id.*”

85. *Id.* (citing 8 C.F.R. § 241.4(e)(2002)). The Court further explains that the alien must demonstrate to the attorney general that they are not a flight risk, as per the conditions in 8 C.F.R. § 241.4(d)(1) (2002)). *Id.*

86. *Id.* at 683-84 (citing 8 C.F.R. § 241.4(k)(2)(iii)-(v) (2002)).

Justice Breyer then explains the underlying facts for both *Zadvydas* and *Ma*.<sup>87</sup> Justice Breyer first establishes the Court's jurisdiction over this case, pursuant to the federal habeas corpus statute.<sup>88</sup> He cites the history of the federal courts involvement in alien deportation<sup>89</sup> and concludes that 28 U.S.C. § 2241 habeas corpus proceedings "remain available as a forum for statutory and constitutional challenges to the post-removal-period detention."<sup>90</sup> Justice Breyer then explains that the post-removal-period detention statute applied to "certain categories of aliens who have been ordered removed . . .," namely, aliens who in some way were thought to pose a risk to the community around them.<sup>91</sup> The government argues that the post-removal-period detention statute "sets no limit on the time" an alien can be held, and so gives the Attorney General and not the courts the right to determine if an alien should continue being detained, and if so, for how long.<sup>92</sup> However, the majority opinion cites precedent which states that when a congressional act raises doubt as to its constitutionality, the Supreme Court will first determine "whether a construction of the statute is fairly possible by which the question may be avoided."<sup>93</sup> Justice Breyer explains that in the past the Court has severely limited immigration statutes to avoid ruling them unconstitutional.<sup>94</sup> Moreover, he says the majority

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87. *Id.* at 684-86 (noting that the Court consolidated the two cases and will consider them together).

88. *Id.* at 687 (citing 28 U.S.C. § 2241, 2241(c)(3) (2000)).

89. *Id.* (noting that before 1952, federal courts used habeas proceedings to consider, "challenges to the lawfulness of immigration-related detention, including challenges to the validity of a deportation order . . ."). From 1952 on, under the Administrative Procedure Act ("APA"), there was an alternate method to review deportation orders in district court. *Id.* (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955)). In 1961, Congress got rid of APA district court review of deportation orders, and gave the federal courts of appeals the right to review initial deportation orders. *Id.* Throughout Congress' action on the issue of deportation orders, habeas review was still the main method for reviewing continued custody after a final deportation order. *Id.* (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212, 215-216 (1968)).

90. *Id.* at 688.

91. *Id.*

92. *Id.* at 689.

93. *Id.* (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

94. *Id.* (citing *United States v. Witkovich*, 353 U.S. 194, 195 (1957)).

of the Court reads the statute in question as limiting the post-removal detention of an alien to a time “reasonably necessary to bring about that alien’s removal from the United States. [The statute] does not permit indefinite detention.”<sup>95</sup> Justice Breyer explains that a statute that permits an alien to be detained indefinitely would violate the Due Process Clause of the Fifth Amendment.<sup>96</sup> Justice Breyer outlines the Court’s precedent, which says that government detention violates the Due Process Clause, “unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and ‘narrow’ non-punitive ‘circumstances’ where a special justification . . . outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”<sup>97</sup> In this case, Justice Breyer explains, we have a civil proceeding which is non-punitive, so we need a special justification to outweigh Ma and Zadvydus’ constitutional protections against being held.<sup>98</sup> The government offers two justifications for the continued detention: preventing flight of the aliens and protecting the community.<sup>99</sup> The Court finds the first justification weak because removal of the aliens was not likely.<sup>100</sup> The Court says they have only upheld preventive detention under the second justification, protecting the community, where there is a particularly dangerous person and they are given strong procedural protections.<sup>101</sup>

Justice Breyer notes that there is a possibility of permanent confinement of the aliens.<sup>102</sup> Since there is no flight risk, the only special circumstance is the fact that the alien is removable, which

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95. *Id.*

96. *Id.* at 690.

97. *Id.* (citing, 481 U.S. at 746); *Foucha v. Louisiana*, 504 U.S. at 80); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (italics in original)).

98. *Id.*

99. *Id.*

100. *Id.* (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)).

101. *Id.* at 690-91 (noting that where cases of preventive detention are potentially indefinite detention, they have typically held there should be a special circumstance, such as a mental illness of the detainee, which helps create the danger).

102. *Id.* at 692.



bears no relation to how dangerous they are.<sup>103</sup> Justice Breyer also notes that the procedural safeguards the statute offers aliens, an administrative proceeding where the alien “bears the burden of proving he is not dangerous, without . . . significant later judicial review”, are less than the procedural safeguards the Constitution requires for property.<sup>104</sup> Justice Breyer then reviews the government’s argument that alien status can justify indefinite detention by itself.<sup>105</sup> Justice Breyer counters that argument by saying there is a difference between the case the government cites, where the alien never entered United States soil, and the instant case, where the aliens had lived in the United States for a number of years.<sup>106</sup> When someone has entered the United States, they are afforded the protection of the Due Process Clause of the Fifth Amendment, because it applies to all “persons” in the United States without regard to their legal residency status.<sup>107</sup> The Court distinguishes this rule of law to the ruling in *Shaughnessy v. United States ex rel. Mezei*,<sup>108</sup> which the government uses in support of their argument that the aliens in question are not required to be given generous procedural safeguards.<sup>109</sup> In *Mezei*, Mezei was not given the protection of the Due Process Clause of the Fifth Amendment because Mezei never got to United States soil.<sup>110</sup> Here, both Zadvydas and Ma were present on United States soil and therefore they are due the full protection of the Due Process Clause.<sup>111</sup>

Justice Breyer then analyzes another argument by the government “that Congress has ‘plenary power’ to create immigration law, and that the judicial branch must defer to executive and legislative branch

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103. *Id.* at 691-92.

104. *Id.* at 692 (citing *South Carolina v. Regan*, 465 U.S. 367, 393 (1984) (O’Connor, J., concurring)).

105. *Id.* at 692-93.

106. *Id.* (citing 345 U.S. 206 (1953)).

107. *Id.* at 693 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) and *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

108. *Mezei*, 345 U.S. 206.

109. *Zadvydas v. Davis*, 533 U.S. at 693-94 (citing *Mezei*, 345 U.S. 206).

110. *Id.* at 693 (citing *Mezei*, 345 U.S. 206).

111. *Id.* at 696.

decision making in that area.”<sup>112</sup> The opinion points out that Congress’ plenary power is subject to constitutional limitations, and in prior cases, the Court has never denied Congress the right to subject aliens to supervision, remove or incarcerate them in appropriate situations.<sup>113</sup> Justice Breyer says the question in the instant case is whether aliens should be subject to indefinite imprisonment in the United States if the government is unable to remove them, not whether aliens can remain or who should be removed.<sup>114</sup> The opinion also says that the case does not require the court to decide which political branch controls entry into the United States.<sup>115</sup> Justice Breyer then states the Court is not going to consider “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect [to] national security.”<sup>116</sup>

Justice Breyer then addresses the government’s last argument that any liberty interest the alien possesses is “greatly diminished” because they lack the legal right to live in the United States.<sup>117</sup> However, the Court distinguishes a choice between the alien being in

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112. *Id.* at 695.

113. *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 941-42 (1983); *Chae Chan Ping*, 130 U.S. at 604)).

114. *Id.* at 694-96.

115. *Id.* at 695-96.

116. *Id.* This dicta by the Court is particularly timely in the wake of the September 11, 2001 attacks on the United States. See *Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills, Interpreter Releases*, Oct. 2001 (discussing proposed anti-terrorism legislation passed in the wake of September 11th, and that lawmakers are being forced to consider the *Zadvydas* ruling in writing legislation). The Court seems to say they feel the threat of terrorism is a special circumstance where indefinite or preventive detention would be more acceptable, and a situation where other political branches should be given greater deference to make decisions. See *Zadvydas v. Davis*, 533 U.S. at 696. Perhaps Congress, in passing new anti-terrorism bills, read through the decision and realized the court will be more likely to uphold indefinite and preventive detentions where there is a threat to national security. See *Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills, Interpreter Releases*, Oct. 2001.

117. *Zadvydas v. Davis*, 533 U.S. at 696.

prison, or in the alternative, at large in the population in the United States, and the situation here, where the alien is in prison or under supervision as part of their release conditions which cannot be violated.<sup>118</sup> Justice Breyer finds that in this case the alien has a liberty interest that is strong enough to question the constitutionality of indefinite detention.<sup>119</sup>

The opinion says that disregarding all the other issues, the Court must give effect to that intent if Congress has clearly stated its intent in the controlling statute.<sup>120</sup> However, Justice Breyer finds no intent by Congress to grant the Attorney General the power to indefinitely confine an alien who is to be removed.<sup>121</sup> Justice Breyer rejects the government's argument that the use of the word "may" in the statute shows the Attorney General had the discretion to hold aliens indefinitely while trying to get them deported.<sup>122</sup> The opinion also disputes the government's reading of the statute's history.<sup>123</sup> Justice Breyer finds nothing in the statutory history which would indicate that Congress intended to allow indefinite or permanent detention, and therefore, once removal does not seem likely, an alien cannot be detained further.<sup>124</sup>

The opinion then addresses the government's argument that, under the statute, a federal habeas court is bound to accept "the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter."<sup>125</sup> Justice Breyer counters the government's argument, stating that federal habeas corpus statutes grant federal courts authority to decide whether a detention is reasonably

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118. *Id.* (citing 8 U.S.C. §§ 1231(a)(3), 1253 (2000) and 8 C.F.R. § 241.5 (2002)).

119. *Id.*

120. *Id.* (citing *Miller v. French*, 530 U.S. 327, 336 (2000)).

121. *Id.* at 697.

122. *Id.* (noting that if Congress wished to authorize indefinite detention of aliens, they would have done so more clearly in the language of the statute).

123. *Id.* at 697-98.

124. *Id.* at 697-99.

125. *Id.* at 699.

necessary to secure removal or not.<sup>126</sup> Justice Breyer says the duty of the habeas court is to decide whether the detention of the alien in question “exceeds a period reasonably necessary to secure removal.”<sup>127</sup> If the court finds that removal of the alien is “not reasonably foreseeable the court should . . .” find the detention unreasonable and not statutorily authorized.<sup>128</sup>

Justice Breyer then recognizes the power the Executive Branch has in matters of foreign policy, and says the courts must “listen with care . . .” when a foreign policy question arises, and “grant the Government appropriate leeway when its judgments rest upon foreign policy expertise.”<sup>129</sup> In order to limit the number of judgments courts will need to make on executive leeway, the Court will recognize a “presumptively reasonable period of detention . . . to guide lower court determinations.”<sup>130</sup> Justice Breyer says the Court is adopting a six-month detention period, and once six months of detention have passed, if an alien can show good reason that there is no “significant likelihood of removal in the reasonably foreseeable future . . .” the government must rebut their evidence, or the alien will be released from custody.<sup>131</sup> The opinion makes clear that the six-month presumption does not mean all aliens must be released after six months, but rather that they must be held in custody until a determination that there is not a “significant likelihood of removal in the reasonably foreseeable future.”<sup>132</sup> The court then vacates the

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126. *Id.* (stating that in deciding the question, the Court is fulfilling the purpose of the writ of habeas corpus “to relieve detention by executive authorities without judicial trial” (citing *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring))).

127. *Id.* (stating that the habeas court is to determine reasonableness in light of the purpose of the statute—to assure the alien is present should the removal happen).

128. *Id.* at 699-700 (stating that if the alien is released because the detention is found to be unreasonable, his release should be supervised as authorized by statute, and if the alien violates the terms of release, his should be detained again).

129. *Id.* at 700.

130. *Id.* at 701.

131. *Id.* (stating that “for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the ‘reasonable foreseeable future’ conversely would have to shrink”).

132. *Id.*

decisions below for both Ma and Zadvydas and remands the cases for further proceedings consistent with the opinion.<sup>133</sup>

## B. Dissenting Opinions

### 1. Justice Scalia's Dissent

Justice Scalia wrote a dissenting opinion.<sup>134</sup> He begins by joining in Part I of Justice Kennedy's dissent, which "establishes the Attorney General's clear statutory authority to detain criminal aliens with no specified time limit."<sup>135</sup> Justice Scalia then states that he is writing separately because he disagrees with Part II of Justice Kennedy's dissent, which suggests there are some alien detention situations where a court is authorized to order the alien's release.<sup>136</sup>

Justice Scalia states that an illegal alien who has been ordered removed from the United States cannot claim a constitutional right of "supervised release" into the United States.<sup>137</sup> Justice Scalia states that since the alien has no legal right to be here, he cannot claim that his freedom from physical restraint or indefinite detention is being violated.<sup>138</sup> Justice Scalia feels the Court should have relied on the

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133. *Id.* at 702.

134. *Id.* (Scalia, J., dissenting). Justice Scalia was joined in his dissent by Justice Thomas.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 703-705 (citing the precedent of *Mezei*, 345 U.S. 206 (1953) in which the Court, "upheld potentially indefinite detention of such an inadmissible alien whom the government was unable to return anywhere else"). In *Mezei*, the Court ruled that an alien was not deprived of any constitutional rights by indefinite detention. *Mezei*, 345 U.S. at 215. Justice Scalia emphasizes that while four Justices dissented because they thought the alien deserved greater protection, no Justice claimed the alien had a "substantive constitutional right to release into this country." *Zadvydas v. Davis*, 533 U.S. at 703. Justice Scalia notes that indeed the dissenting opinion of Justice Jackson, who was joined by Justice Frankfurter, stated the exact opposite opinion, that due process gives aliens no right to remain in the United States. *Id.* (citing *Mezei*, 345 U.S. at 222-23 (Jackson, J., dissenting)). Justice Scalia explains that the Court in the instant case neither overrules nor applies *Mezei*, but instead distinguishes it. *Id.* at 703-04. Justice Scalia then

standards of the *Shaughnessy v. United States ex rel. Mezei* case to rule in the instant case.<sup>139</sup> Justice Scalia then states what he feels was Congress's intent: to give the same rights to an alien who has been ordered removed from our country and an alien at the border seeking entry.<sup>140</sup> Justice Scalia charged that the majority opinion is in effect giving greater due process rights to aliens ordered removed from our country.<sup>141</sup> Justice Scalia's dissent was premised on his belief that *Mezei* was the appropriate standard, and that the authority granted by Congress to the Attorney General was constitutional.<sup>142</sup>

## 2. Justice Kennedy's Dissent

Justice Kennedy wrote a second dissent, which argues that the majority is seeking to avoid a constitutional question.<sup>143</sup> He feels in doing so, the Court interprets the statute without regard to Congress's intent, and actually amends the statute itself.<sup>144</sup> Justice Kennedy feels the majority is incorrectly providing the Judicial Branch with power the Executive Branch alone should have, and that the majority is allowing the release of possibly dangerous aliens into the public.<sup>145</sup> Justice Kennedy further states that the Court did not actually avoid a constitutional question, but are meddling incorrectly with the balance of powers, which raises serious constitutional concerns.<sup>146</sup> Justice

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dissects the majority opinion's distinguishing of *Mezei*, and concludes that the majority does not effectively distinguish the instant case from *Mezei*. *Id.*

139. *Id.* at 705 (citing *Mezei*, 345 U.S. 206 (1953)).

140. *Id.*

141. *Id.* (noting that Congress provided authority to detain aliens both at the border and those ordered removed from the country in the same statutory provision, 8 U.S.C. § 1231(a)(6), which shows that Congress thought the two groups should have equal rights).

142. *Id.*

143. *Id.* Justice Kennedy was joined by Chief Justice Rehnquist, and joined in Part I of his dissent by Justice Scalia and Justice Thomas. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 705-06 (noting that the Court is "raising serious constitutional concerns not just for the cases at hand but for the Court's own view of its proper authority").

Kennedy ends his introduction by saying he dissents because he feels the Court reaches the “wrong result[s] for the wrong reason.”<sup>147</sup>

Justice Kennedy begins his argument by saying the Immigration and Nationality Act (“INA”) is straightforward, and gives the Attorney General discretion to detain aliens ordered removed beyond the ninety-day removal period.<sup>148</sup> Justice Kennedy states the issue: “[W]hether the authorization to detain beyond the removal period is subject to the implied, non-textual limitation that the detention be no longer than reasonably necessary to effect removal to another country.”<sup>149</sup> The majority reads this limitation into the statute, but Justice Kennedy rejects their interpretation and says it “contradicts and defeats the purpose set forth in the express terms of the statutory text.”<sup>150</sup>

Justice Kennedy concludes that the majority undertakes an inconsistent analysis, because the majority recognizes where Congress sets out their intent, the Court must follow; however, the majority fails to accomplish this.<sup>151</sup> Justice Kennedy frames the rule that the Court can choose among “constructions which are ‘fairly possible,’” and given two equally plausible interpretations should choose the one that avoids a constitutional question.<sup>152</sup> However, Justice Kennedy does not think the majority has a plausible reading of the statute, because their reading goes against the stated Congressional purpose.<sup>153</sup> He posits that the majority has undertaken to amend the statute to impose a six-month limit for the government to proceed with deportation, and that this amendment “defeats the statutory purpose and design.”<sup>154</sup> Justice Kennedy points out that other sections of 8 U.S.C § 1231 impose a reasonable time period requirement for removal, but the section in question does not, and

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147. *Id.* at 706.

148. *Id.* (citing Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952)).

149. *Id.*

150. *Id.* at 706-07.

151. *Id.* at 707.

152. *Id.* (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

153. *Id.*

154. *Id.*

this omission should not be seen as meaning the writers of the statute were not intending to impose a reasonable time period requirement in 8 U.S.C. § 1231(a)(6).<sup>155</sup>

Justice Kennedy then argues that the six month requirement the majority imposes makes the purpose of the statute, to protect the community, “ineffective.”<sup>156</sup> Justice Kennedy notes that Congress has made special provisions for aliens who are removable but cannot be removed, and who need not be detained, allowing them to have jobs “illustrates a balance in statutory design.”<sup>157</sup> Justice Kennedy says the majority makes the other side of the balance, detaining some aliens to protect the community, meaningless with this ruling.<sup>158</sup> Justice Kennedy concedes that the majority is correct in that the Court can limit a statute that raises constitutional questions, but it should only do so “in aid of the statutory purpose.”<sup>159</sup> Here, Justice Kennedy argues, the statute gives the attorney general factors to look at to continue detainment of the alien, but the Court makes those factors irrelevant with this decision.<sup>160</sup>

Justice Kennedy states the majority has left two possible interpretations of the statute: 1) the majority rule applies to both aliens who are inadmissible at the border and those aliens in the United States who are ordered removed; or 2) removable aliens should be treated differently.<sup>161</sup> Justice Kennedy feels it is not a correct interpretation of the statute to state that time limits apply differently to the two classes, but this is what the majority has ruled.<sup>162</sup> He points out that Congress has great Legislative Branch authority over immigration matters, so, “it is reasonable to assume then . . . when Congress provided for detention ‘beyond the removal period,’ it exercised its considerable power over immigration” and

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155. *Id.* at 708.

156. *Id.*

157. *Id.*

158. *Id.* (noting that the fact an alien cannot be deported does not make him any less of a danger).

159. *Id.* at 710.

160. *Id.*

161. *Id.*

162. *Id.* at 710-11.



allowed the Attorney General the power to detain admissible and removable aliens for as long as they are either at risk to flee or a danger to the community.<sup>163</sup> Justice Kennedy states that in the instant case, the Court is upsetting the balance of powers, that judicial orders releasing removable aliens can cloud the United States vision of a united immigration policy.<sup>164</sup>

Justice Kennedy then argues that the cases the Court relies on to support the six-month presumption are not applicable.<sup>165</sup> The dissent argues the six month period “bears no particular relationship to how long it now takes to deport any group of aliens, or, for that matter, how long it took in the past to remove.”<sup>166</sup> The instant case itself demonstrates that it can take years to negotiate repatriation.<sup>167</sup> Justice Kennedy states the negative effects of the six-month period: It will take from Executive Branch efforts to negotiate repatriations, and it may encourage aliens not to cooperate in repatriations, so their removal will not seem foreseeable and they will be released.<sup>168</sup> Justice Kennedy also argues that the danger from aliens released because of mandatory release dates is clear, and government statistics show “high recidivism rates for released aliens.”<sup>169</sup> The dissent points out the largest danger may come from “[u]nderworld and terrorist links [between a removable alien and his associates that] are subtle and may be overseas, beyond our jurisdiction to impose felony charges.”<sup>170</sup>

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163. *Id.* at 711.

164. *Id.* at 711-12 (noting that the orders could also interfere with foreign relations, where the United States is trying to get aliens sent back to their home country). Justice Kennedy feels that after six months, the majority is handing the Judicial Branch power over foreign relations, which he believes is a dangerous move. *Id.*

165. *Id.* at 712.

166. *Id.*

167. *Id.* at 712-13.

168. *Id.* at 713.

169. *Id.* Justice Kennedy points out the fact that although an alien has served a sentence, this does not mean they are no longer a risk. *Id.*

170. *Id.* at 714. In light of September 11, 2001, Justice Kennedy’s comments seem particularly timely and prescient. See Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills, Interpreter Releases, Oct, 2001. A great fear would be if a removable alien was

Justice Kennedy sees a paradox in the majority's reasoning: The Court's ruling does not apply to an alien who enters "by fraud or stealth", but does apply to an alien who enters legally and once in the United States commits a removable act.<sup>171</sup> Justice Kennedy fails to see why the rationale only applies to the first alien.<sup>172</sup> He also feels the consideration of the "reasonable foreseeability of removal" of the alien the majority allows should not be a judicial question.<sup>173</sup> Justice Kennedy notes, "[t]he majority does say the release of terrorists or other 'special circumstances' might justify 'heightened deference to the judgments of the political branches with respect to matters of national security.'"<sup>174</sup> Justice Kennedy also notes the majority uses an "assessment of risk" test, but the statute cannot allow the Attorney General to do the same.<sup>175</sup>

Justice Kennedy sees a potential problem: often other countries will not allow dangerous criminals back into their country, so the most dangerous criminals are the ones most likely to be released, because there is no reasonable foreseeability they are going to be repatriated.<sup>176</sup> The dissent feels the majority rule might extend to people who illegally or fraudulently enter the United States, and

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convicted of a crime and did have terrorist links outside of our country, but was unable to be deported. *Id.* The hands of the government are tied, because the majority ruling in the instant case mandates release if removal is not foreseeable after the alien has been detained for six months. *Zadvydas v. Davis*, 533 U.S. at 714.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 714-15. Justice Kennedy's noting of this facet of the majority opinion is especially relevant in a post-September 11th world. See Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills; Interpreter Releases, Oct, 2001; *Hearing on Immigration Detention Policy Before the House Subcomm. on Immigration and Claims, House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law) (for discussions of the consideration of *Zadvydas v. Davis* in adopting new legislation in a post-September 11th world).

175. *Zadvydas v. Davis*, 533 U.S. at 715.

176. *Id.* (giving an example of a 9th Circuit case where such a circumstance occurred).

allow them to be set free if there is no reasonable belief the government is working towards getting them sent back.<sup>177</sup> Justice Kennedy also notes that, “[t]he reason detention is permitted at all is that a removable alien does not have the same liberty interest as a citizen does,” but he feels the majority fails to recognize this.<sup>178</sup> He explains that this is why if an alien violates his release terms, he is ordered to be detained again.<sup>179</sup> Justice Kennedy then states he feels that the Court, with its decision, is getting too far involved in foreign policy.<sup>180</sup>

Justice Kennedy then transitions by saying aliens are entitled to the protection of the Due Process Clause, which “includes protection against unlawful or arbitrary personal restraint or detention.”<sup>181</sup> However, an alien’s right to liberty is subject to limitations and conditions that a United States citizen’s rights are not subject to.<sup>182</sup> At a deportation hearing, the government must show by clear and convincing evidence that an alien should be deported and the alien is given the right to appeal.<sup>183</sup> Justice Kennedy feels this gives the aliens “substantial procedural safeguards.”<sup>184</sup> Justice Kennedy suggests that aliens who have not entered the United States are distinguished from those who have: “[t]hey are removable, and their rights must be defined in accordance with that status.”<sup>185</sup> Once ordered to be removed, Justice Kennedy states that no alien has the right to remain in the United States.<sup>186</sup> He feels the Court has given more rights to aliens who were admitted into the United States than

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177. *Id.* at 716 (giving the example of *Rosales-Garcia v. Holland* case, where a circumstance similar to his example occurred) (citing *Rosales-Garcia v. Holland*, 238 F.3d 704, 705 (5th Cir. 2001)).

178. *Id.* at 717.

179. *Id.* at 717-18.

180. *Id.* at 718.

181. *Id.*

182. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

183. *Id.* at 718-19 (citing 8 U.S.C. § 1229a(c)(3)(A) (2000); 8 U.S.C. § 1229a(c)(5) (2000)).

184. *Id.* at 719.

185. *Id.* at 720.

186. *Id.*

to those “stopped at the border.”<sup>187</sup> Justice Kennedy believes admitted aliens are entitled to a deportation hearing because they have an interest in staying, while aliens who never entered do not have this interest.<sup>188</sup> Additionally, both types of aliens “are entitled to be free from detention that is arbitrary or capricious.”<sup>189</sup> Justice Kennedy concludes that if the alien is detained incident to their removal, the detention cannot be punishment.<sup>190</sup> To detain an alien to keep them from fleeing or because it is determined they are a danger to the community is not “arbitrary or capricious.”<sup>191</sup>

Justice Kennedy says when deciding whether the due process rights of removable aliens have been violated, you must ask “whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large.”<sup>192</sup> The Attorney General can use leeway given by the INA to “ensure fairness and regularity in INS detention decisions.”<sup>193</sup> A post-custody review is allowed before the ninety-day period expires.<sup>194</sup> The alien can present information to support their release and the district director can personally evaluate the alien.<sup>195</sup> At the end of the ninety-day period, an alien transferred to the detention unit at INS headquarters will have an initial custody review within three months.<sup>196</sup>

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187. *Id.*

188. *Id.* at 721.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 722.

194. *Id.* at 720-21.

195. *Id.* (citing 8 C.F.R. § 241.4 (2002)).

196. *Id.* (citing 8 C.F.R. § 241.4(k)(2)(ii) (2002) and giving a full explanation of INS detention policy and review).

Justice Kennedy analogizes INS detention decisions to parole revocation hearings.<sup>197</sup> Justice Kennedy feels that the fact the alien carries the burden of proving their detention is no longer justified is not unfair.<sup>198</sup> Justice Kennedy states “aliens in the instant cases have notice . . . that the INA imposes as a consequence of the commission of certain crimes not only deportation but also the possibility of continued detention in cases where deportation is not immediately feasible.”<sup>199</sup>

Justice Kennedy feels that the aliens have the due process right to have the INS conduct review by procedures already laid out in the statute.<sup>200</sup> Believing that the majority is focusing on the wrong factors in allowing review of INS hearings when they zero in on “status repatriation negotiations,”<sup>201</sup> Justice Kennedy feels that they should focus on flight risk or danger to the community.<sup>202</sup> Justice Kennedy believes the majority decision takes away Executive Branch primacy in foreign affairs because decisions are subject to review by courts;<sup>203</sup> thereby becoming an improper judicial function.<sup>204</sup> Justice Kennedy concludes by saying the Court should have reversed the Ninth Circuit’s ruling on the *Ma* case, and upheld the Fifth Circuit’s decision on the *Zadvydas v. Davis* case.<sup>205</sup>

#### IV. IMPACT

The ramifications of the Supreme Court’s decision in *Zadvydas v. Davis*<sup>206</sup> have already been, and will continue to be, far reaching.<sup>207</sup>

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197. *Id.* at 723 (citing *Morrisey v. Brewer*, 408 U.S. 471 (1972) (where the Court ruled that a parole revocation review process could be done by a neutral administrative official).

198. *Id.* at 723-24.

199. *Id.* at 724.

200. *Id.*

201. *Id.* at 725.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

With the events of September 11, 2001, the ramifications of the decision would appear to be even more far reaching than previously thought.<sup>208</sup> At the time the decision came down, articles noted that some lawyers thought *Zadvydas v. Davis* established “a somewhat vague standard” and would be a “looming issue” in the coming years.<sup>209</sup> Since the events of September 11, 2001, the *Zadvydas v. Davis* ruling has become timely. In particular, the Court’s ruling that special circumstances, such as terrorism, can justify holding an immigrant beyond the ninety day period has become more important.<sup>210</sup>

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207. See *State Dept. Plans to Assist INS in Repatriating Detained Criminal Aliens After Zadvydas*, Interpreter Releases, Aug. 2001 (detailing a State Department cable sent in early August, 2001 to their diplomatic and consular posts explaining the impact of the *Zadvydas v. Davis* decision and that the State Department will make full efforts to assist the Department of Justice in their repatriation efforts. The cable also requires that State Department employees must step up their efforts to aid repatriation of aliens ordered removed from the United States).

208. See *Review of Dep't of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law) (discussing the Immigration and Naturalization Services’ detention policy, the impact of the *Zadvydas v. Davis* case on INS detention policy, and how post-September 11th, in the rush to be tough on immigration, the INS must remember the *Zadvydas v. Davis* decision and not violate the due process rights of immigrants).

209. Maria Coyle, *Supreme Court Trims Congress’ Sails on Immigration Control*, MIAMI DAILY BUS. REV., July 11, 2001, at 10 (outlining the Court’s ruling in *Zadvydas v. Davis* and the legal community’s opinion of the potential impact of the decision); See also John Council & Jonathan Ringel, *Immigrants Can’t Linger in Limbo Indefinitely*, TEX. LAWYER, July 9, 2001, at 5 (detailing the response of an immigration lawyer and an INS agent to the *Zadvydas v. Davis* decision).

210. See Mary Jacoby, *Al-Najjar to Appeal Deportation Order to Supreme Court*, ST. PETERSBURG TIMES, Nov. 16, 2001, at 4A (detailing the plight of Mazen Al-Najjar, an alien ordered deported, who the government wants to keep in custody because of his alleged ties to terrorist groups. The justification given for holding Najjar was the Court’s ruling in *Zadvydas* that special circumstances, such as terrorist ties, can justify holding an alien ordered deported indefinitely when no country will take him. The 11th Circuit Court of Appeals recently ruled that Al-Najjar cannot be detained while awaiting deportation). For further discussion of the *Zadvydas v. Davis* case and its impact, see, e.g., Micah Herzig, *Is Korematsu Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIGR. L.J. 685 (2002); Peter J. Spiro, *Explaining The*

### A. Legislative Impact

The most clear legislative impact of the *Zadvydas v. Davis* decision is the anti-terrorism legislation passed after September 11, 2001, the USA Patriot Act ("Act").<sup>211</sup> Many commentators who were brought to Congress to testify about proposed anti-terrorism legislation mentioned *Zadvydas v. Davis*.<sup>212</sup> To examine the Act, is it helpful to study, "how the Act balances the need for a more powerful executive to fight terrorism with congressional and judicial oversight to protect individual rights."<sup>213</sup> The Act allows indefinite detention of aliens whose repatriation is not reasonably foreseeable.<sup>214</sup> This

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*End Of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); Stacy J. Borisov, *Give Me Liberty Or Give Me Deportation: The Indefinite Detention of Non-Removable, Criminal Aliens*, 13 U. FLA. J.L. & PUB. POL'Y 183 (2001); David A. Martin, *Graduated Application Of Constitutional Protections For Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47 (2001); *Developments in the Law: The Law of Prisons*, *supra* note 3; *Leading Cases*, 115 HARV. L. REV. 366 (2001).

211. Pub. L. No. 107-56, 115 Stat. 272 (2001).

212. See, e.g., *Review of the Dep't of Justice Immigration Detention Policy Before the House Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law) (mentioning *Zadvydas v. Davis* in the context of how aliens are afforded due process rights under our Constitution, and that potential legislation must note this), *Hearing on Civil Liberties and Proposed Anti-Terrorism Legislation Before the Senate. Subcomm. on the Constitution, Federalism and Property Rights, Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Professor David Cole) (mentioning *Zadvydas v. Davis* in the context of proposed legislation which would allow the INS to detain deportable aliens indefinitely. Cole reminds the committee that *Zadvydas v. Davis* has imposed a six-month post detention removal period in which the alien must have a reasonable possibility of being deported, or be released), *Hearing on the Constitutionality of Various Provisions of the Proposed Anti-Terrorism Act of 2001 before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Douglas W. Kmiec, Dean of the Law School of The Catholic University of America in Washington, D.C.) (mentioning *Zadvydas v. Davis* in the context of stating that indefinite detention is not ruled out by *Zadvydas v. Davis*, "where dangerousness is accompanied by special circumstance," which means the proposed legislation is indeed constitutional).

213. Michael T. McCarthy, *Recent Developments: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 436 (2002).

214. See USA Patriot Act, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 351 (2001).

would seem to be in clear defiance of the Court's ruling in *Zadvydas v. Davis*.<sup>215</sup> In addition, the Act also allows the INS to detain aliens who were not ordered deported.<sup>216</sup> The Act also "does not require an objective showing that the individual poses a danger to the community[;] it relies instead on the Attorney General's determination that he has 'reasonable grounds' to believe an immigrant is engaged in terrorist activity."<sup>217</sup> These provisions of the Act raise serious constitutional questions when examined in light of the Court's decision in *Zadvydas v. Davis*. In future anti-terrorist acts, members of Congress must keep in mind the ruling in *Zadvydas v. Davis* to balance their legislation, and make sure it is constitutional while still having the desired effect of preventing terrorism. Overall, the legislative impact of the decision in the instant case appears to be important and weighty.

### B. Judicial Impact

The most obvious judicial impact of the *Zadvydas v. Davis* decision is the lawsuits of immigrants ordered detained and who have been detained beyond the six-month period allowed in the decision.

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215. See *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding:

We . . . have reason to believe . . . that Congress . . . doubted the Constitutionality of detention for more than six months. Consequently . . . we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink. . . . [a]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future) (citation omitted).

216. See *Developments in the Law: Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, *supra* note 36, at 1935 (citing USA Patriot Act § 412(a)). The article argues that though some think the Court's language in *Zadvydas* about terrorism and special justifications for detention signals this portion of the Patriot Act is constitutional, that language was dictum, and therefore the provision's constitutionality is debatable. See *id.* at 1936.

217. *Id.*



Those immigrants, with the handing down of the decision, immediately had the right to file lawsuits, claiming there was no reasonable belief that they would ever be deported and thus should be released. In *Zadvydas v. Davis*, the Court ruled that federal habeas courts have the right to hear these cases.<sup>218</sup> Therefore, it is to be expected that the caseload in federal habeas courts, district courts and courts of appeal will increase.<sup>219</sup>

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218. See *Zadvydas v. Davis*, 533 U.S. at 699-702.

219. The Third and Ninth Circuit Courts of Appeals have actually extended the rights afforded to detained aliens in *Zadvydas v. Davis*. See Molly McDonough, *Immigrants Win Right to Hearings: Circuits Reject Blanket Policy of Detention*, ABA J. E-REPORTS, Jan. 11, 2002, at E-Report 7. In *Kim v. Zilgar*, the Ninth Circuit ruled that:

Following the approach of the *Zadvydas* majority, we thus conclude that the government has not provided a "special justification" for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest on an individualized determination of flight risk and dangerousness. It is sufficient for our purposes to rely on the reasoning of the majority in *Zadvydas*. But we note that § 1226(c) also cannot pass constitutional muster under the alternative analysis set forth by Justice Kennedy in that case.

*Kim v. Zilgar*, 276 F.3d 523, 535 (9th Cir. 2002). Therefore, the Ninth Circuit ruled that even under the stricter analysis proposed in Justice Kennedy's dissent, under *Zadvydas v. Davis*, aliens waiting to be deported are entitled to a bail hearing. See *id.* In another Ninth Circuit case, the Ninth Circuit reasoning under *Zadvydas v. Davis* held that an immigrant never legally admitted into the United States could not be held indefinitely while awaiting deportation, if deportation appears unlikely. *Xi v. United States Immigration and Naturalization Service*, 298 F.3d 832 (9th Cir. 2002). See also Angela Watercutter, *Court Sets Limits On Detention of Migrants*, SAN DIEGO UNION-TRIBUNE, Aug. 2, 2002, at A4 (distinguishing *Xi* from *Zadvydas v. Davis*, explaining that in applying *Zadvydas v. Davis*, the *Xi* court gives greater rights than *Zadvydas v. Davis* afforded). In *Patel v. Zemski*, the Third Circuit Court of Appeals found that the government could not indefinitely detain individuals waiting to be deported unless those individuals are given an "individualized hearing" to determine that they are indeed a flight risk or a danger to the community. *Patel v. Zemski*, 275 F.3d 299, 312 (3rd Cir. 2001). However, in the wake of the *Zadvydas* decision, the Court's ruling has been weakened by lower federal courts who are declining to extend and distinguishing the decision from cases they face. See, e.g., *Soto Ramirez v. Ashcroft*, 228 F.Supp.2d 566, 571 (M.D.Pa. 2002) (declined to extend *Zadvydas* on the grounds that the Petitioner never entered the United States, and Ma and *Zadvydas* had); *Al Najjar*, 186 at 1243-44 (holding that *Zadvydas* governs how long detention can be forced on aliens the INS is seeking to deport, and declining to extend *Zadvydas* to

An example of the judicial impact is the case of Mazen Al-Najjar, a former University of South Florida professor who battled the government in court to stay out of prison while he fought his deportation order.<sup>220</sup> Al-Najjar was ordered released while he fought his deportation.<sup>221</sup> However, the government appealed, arguing that special circumstances, Al-Najjar's possible terrorist ties, should have allowed for his continued detention.<sup>222</sup> The government's special circumstances argument is a result of *Zadvydas v. Davis*, as there the Court ruled that an immigrant's indefinite detention could be justified only by special circumstances, which must be pled and proven by the government.<sup>223</sup> This case is but one example of the possible drawn out legal battles that can result from the Court's ruling in *Zadvydas v. Davis*.<sup>224</sup>

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cover the conditions the aliens face while waiting for deportation); *Badio v. United States*, 172 F.Supp.2d 1200, 1204 (D. Minn. 2001) (holding that *Zadvydas* governs "post-removal-period detention . . ." and declining to extend *Zadvydas* to cover "pre-removal-order detentions . . ."); *Fernandez-Fajardo v. I.N.S.*, 193 F.Supp.2d 877, 885 (M.D. La. 2001) (holding that *Zadvydas* applies to those who have actually entered the United States, and declining to extend *Zadvydas* to those who are detained at the border); *Lozano-Castaneda v. Garcia*, -- F.Supp.2d --, 2002 WL 31939264, at \*6 (W.D. Tex. Dec. 26, 2002) (saying that a test set forth in *Salerno* rather than the *Zadvydas* decision should be applied to the Petitioner); *Herrero-Rodriguez v. Bailey*, 237 F.Supp.2d 543, 547 (D.N.J. 2002) (holding that *Zadvydas* applies to deportable aliens, and declining to extend *Zadvydas* to govern inadmissible aliens rights).

220. See Jacoby, *supra* note 210.

221. See *id.*

222. See *id.* Indeed, the government won the argument in 2002, when a district court judge denied Al-Najjar's writ of habeas corpus which requested he be released while awaiting removal. *Al-Najjar v. Ashcroft*, 186 F. Supp. 2d 1235 (S.D. Fla. 2002).

223. See Jacoby, *supra* note 210. Mr. Al-Najjar was deported by the United States and left in Beirut, Lebanon on August 24, 2002. Bassem Mroue, *Lebanon Criticizes U.S. Deportation of Tampa Palestinian Prof*, ASSOCIATED PRESS NEWSWIREs, Aug. 28, 2002. Mr. Al-Najjar was detained for three and a half years total while awaiting his deportation. *Across the Nation: Professor Suspected Of Ties To Terrorism Deported To Beirut*, CHICAGO TRIBUNE, Aug. 25, 2002, at 13.

224. See *Ninth Circuit Issues Amended Detention Ruling in the Wake of Zadvydas*, 78 No.30 Interpreter Releases, 1261 (Aug. 2001) (Explaining how the Ninth Circuit was forced to reconsider their decision in two prior rulings, *Ma v. Ashcroft* and *Ma v. Reno*, as a result of the *Zadvydas v. Davis* decision). The Ninth Circuit ruled that in light of *Zadvydas v. Davis*, they would hold with their earlier decision to release Ma because there was no reasonable belief he would be

### C. Administrative Impact

There is a case decided subsequent to *Zadvydas v. Davis* which illustrates the difficulty of the decision for administrative bodies.<sup>225</sup> Reynero Arteago Carballo was a Cuban immigrant convicted of many crimes in the United States, and ordered deported once he had served his sentence for 1983 conviction for attempted first degree murder, aggravated assault with a deadly weapon and robbery.<sup>226</sup> Upon Carballo's release from prison, he was detained in a federal corrections institute.<sup>227</sup> While at the Federal Corrections institute, Carballo has "committed assault, threatened bodily harm to a staff member, trespassed in an unauthorized area, and possessed marijuana while in federal custody."<sup>228</sup> The INS annually reviewed Carballo's case, but has each time denied him parole, finding he is a continued

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deported to his home country, and he had been held far beyond the statutory period. See *Id.* Indeed, the INS embroiled in controversy over whether it is "systematically thwarting" the Court's holding in *Zadvydas v. Davis*. Elizabeth Amon, *INS Flouts Court on Prisoners, Critics Say: Agency Loses One Case, Faces New Suit*, THE NAT'L L.J., Aug. 12, 2002, at Col. 4. A class action petition filed in Chicago by the Midwest Immigrant and Human Rights Center (*Hmaidan v. Ashcroft*, No. 02CV5097 (July 25, 2002)) claims the INS is ignoring *Zadvydas v. Davis*, that immigration attorneys are being forced to file habeas petitions for aliens who should automatically be released under the rules set forth in *Zadvydas v. Davis*. *Id.* The INS has denied the allegations. *Id.* However, the Petitioners in the class action have strong support in the recent case of *Seretse-Khama v. Aschcroft*. No. Civ.A. 020955JDB, 2002 WL 1711751 (D.D.C. July 22, 2002). In *Seretse-Khama*, a United States District Court Judge, John Bates, freed Donald Seretse-Khama, who was held indefinitely by the INS for four years after serving out his sentence for possession of cocaine with intent to distribute while the INS tried to deport him. *Id.* at \*2-\*3. Though Liberia (*Seretse-Khama's* home country) patently refused to issue him travel documents, the INS continued to hold him. *Id.* at \*2-\*4. Judge Bates found the INS's assertions that *Seretse-Khama* was soon to be deported, "simply, and blatantly, false." *Id.* at \*9. Cases like *Seretse-Khama's* and others, like Mohammed Nofal (a Palestinian who has been awaiting deportation by the INS since 1998, and whose deportation seems unlikely) will provide the class action filed with strong evidence of INS noncompliance with *Zadvydas v. Davis*. For *Some, Deportation Takes Years*, DESERET NEWS, Dec. 10, 2001, at A2.

225. See *Alien's Successive Habeas Petition Not Saved by Zadvydas*, 78 No. 41 Sixth Circuit Rules, Interpreter Releases, 1637 (Oct. 2001) [hereinafter *Alien's Habeas Petition*].

226. *Id.*

227. *Id.*

228. *Id.* at 1638.

danger to our society, in light of his convictions, and in light of his continued violent nature in prison.<sup>229</sup> Carballo filed a writ of habeas corpus, which was denied by the Sixth Circuit Court of Appeals, who relied heavily on the standards laid out in the *Shaugnessy v. United States ex rel. Mezei* case in ruling that the INS was justified in its continued detention of Carballo.<sup>230</sup> With the decision in *Zadvydas v. Davis*, the Sixth Circuit was forced to reconsider their decision on whether the INS was lawfully detaining Carballo.<sup>231</sup> Ultimately, the Sixth Circuit decided that Carballo's continued detention was justified even under the Supreme Court's new ruling in *Zadvydas v. Davis*.<sup>232</sup>

The situation which arose with the INS' detention of Carballo is illustrative of a greater impact the *Zadvydas v. Davis* ruling will have on administrative law. Under the Court's old rulings, the INS's continued detention of Carballo, and many other immigrants, was considered justified. However, with the *Zadvydas v. Davis* decision, the INS has to reconsider the detention decisions they are making. The INS as an administrative body has to take note of whether, under *Zadvydas v. Davis*, they have a reasonable belief they are going to be able to deport an alien when they have held the alien beyond the statutory period. This will potentially force the INS to reconsider the cases of many aliens they have held far beyond the statutory period. In addition, the INS must adopt new standards for detentions that begin after the *Zadvydas v. Davis* ruling, so the agency's decisions on whether or not to detain an alien beyond the statutory period will not be overturned by a Court of Appeals. The potential for backlog and an increased workload for the INS as an administrative agency is endless.<sup>233</sup>

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229. *Id.*

230. *Id.*

231. *Id.*; Carballo v. Luttrell, No.99-5698, 2001 WL 1194699 (6th Cir. 2001).

232. See *Alien's Habeas Petition*, *supra* note 225, at 1638.

233. Further, in his dissent, Justice Kennedy discusses a likely impact of *Zadvydas v. Davis*: aliens ordered detained will not cooperate with authorities in getting themselves returned to their home country. *Zadvydas v. Davis*, 533 U.S. 678, 713 (2001) (Kennedy, J., dissenting). Justice Kennedy argues, logically, that it would be in the best interest of the alien ordered removed not to cooperate, because that will make it highly unforeseeable that they are going to be deported.

## V. CONCLUSION

The Supreme Court's decision in the *Zadvydas v. Davis* case has ramifications that are far more reaching than the decision's effect on Mr. Zadvydas and Mr. Ma. The decision affects how thousands of aliens convicted of crimes, ordered deported and awaiting removal will be treated. The majority and both dissents raised important issues and made strong arguments for the conclusion they would have liked in the case. Ultimately, the majority's more lenient view of the Due Process Clause and the rights aliens ordered deported should be given won out. With the events of September 11, 2001, the decision in this case becomes more timely. The majority refused to raise the issue of how suspected terrorists should be treated in deportation situations, and the dissenting opinions clearly thought this was a mistake. Returning to the hypothetical posed at the beginning of this article, the reality of this decision's real world impact is startlingly clear. If your child is murdered by a resident alien and our government is unable to deport the murderer after their sentence is served, how would you feel if that person was released back onto your streets, in your neighborhood? From the standpoint of the murderer, who has served their sentence, is it fair to continue to detain them? How should courts balance the safety interest of the community at large with the liberty interests of the criminal? The path lower courts take in interpreting the standard laid out in *Zadvydas v. Davis* could very well affect our national security and how this hypothetical plays out.

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*Id.* (Kennedy, J., dissenting). If it is unforeseeable that alien could be deported, once they have been held for six months, they will have to be released under the reasoning of the instant case. *Id.* (Kennedy, J., dissenting). Justice Kennedy's argument is well-reasoned. Given the choice of being deported back to a country they left, or not cooperating and being allowed to remain in the United States, it seems highly likely that an alien would chose the latter option.