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The Fate of "Unremovable" Aliens Before and After September 11, 2001: The Supreme Court's Presumptive Six-Month Limit to Post-Removal-Period Detention

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"Americans are not a narrow tribe. Our blood is as the flood of the Amazon, made up of a thousand noble currents all pouring into one."
—Herman Melville

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I. INTRODUCTION

March 1, 1998

> I was born in Hamburg, Germany on January 14, 1948 in a refugee camp . . . my parents came form [sic] the U.S.S.R. We were brought to the United States as legal permanent residents by Catholic Services. I'm fifty-years old now and have been in the United States for forty-eight years. In 1990 I went to jail . . . and when I was ready to go home the INS arrested me. Since September 6, 1996, I have been waiting to be deported. Germany has already told the INS that they will not accept me, have no records of me at all or of my parents either . . . . I always showed up in court and never ran from [the INS]. I asked them to release me and I would go on my own, but they said no one would take me. Why still hold me then?
>
> —M.J. from Germany, Snyder County Jail, Selingsgrove [sic], Pennsylvania[1]

United States Supreme Court Justice William J. Brennan once wrote of immigrants, "Whatever his status under the immigration laws, an alien is surely a 'person' . . . . Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[2] Almost twenty years after the Supreme Court recognized the due process rights of aliens, the Court is still reviewing laws that attempt to deprive aliens of such rights. One of these laws is the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) enacted in 1996, which altered numerous provisions of the Immigration and Nationality Act (INA).[3] Under the IIRIRA, Congress required the Immigration and Naturalization Service (INS) to detain aliens

1. *United States Locked Away: Immigration Detainees in Jails in the United States*, 10 HUMAN RIGHTS WATCH REPORT, No. 1 (G), Sept. 1998, *available at* http://www.hrw.org/reports98/us-immig/Ins989-01.htm#TopOfPage.

2. Plyler v. Doe, 457 U.S. 202, 210 (1982).

3. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C. (Supp. 1997)) [hereinafter IIRIRA].

ordered deported during the removal period of ninety days.[4] Another provision of the IIRIRA, which applies to inadmissible or criminal aliens, allows the Attorney General to detain an alien ordered removed beyond the removal period, and does not limit the time of detention.[5] The law has been described by one observer as "the most diverse, divisive and draconian immigration law enacted since the Chinese Exclusion Act of 1882."[6]

Since the United States did not have repatriation agreements with the countries of many aliens, and removal was not accomplished, the INS detained thousands of aliens indefinitely under the IIRIRA, in cases similar to that of M.J. from Germany.[7] Legal challenges resulted in a split between the Fifth and the Ninth Circuits, which led the United States Supreme Court to address the issue. When the Supreme Court consolidated these two cases into one in *Zadvydas v. Davis*, the lives of about 3,800 detainees were at stake.[8] The Court held that where deportation is not "reasonably foreseeable," the statute does not authorize continued detention.[9] The Court concluded that the statute had a presumptive post-removal detention period of six months, after which, if 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 . . . to rebut [the alien's]

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4. 8 U.S.C. § 1231(a)(1)(A)-(a)(2) (2001).

5. 8 U.S.C. § 1231(a)(6) (2001). The statute in its entirety reads:

> (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).

Id.

6. David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 821 (1998) (citing Dan Danilov, *U.S. Courts Offer No Protection from Latest Immigration Law*, SEATTLE POST-INTELLIGENCER, Dec. 17, 1996, at A19).

7. M. Gavan Montague, Note, *Should Aliens Be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439, 1444-45 (2001) (explaining that the INS has interpreted the statute to allow for detention of removable, deportable, and excludable aliens, since the IIRIRA does not distinguish between excludable and deportable aliens, which has resulted in the INS detaining more aliens and indefinitely detaining aliens previously labeled deportable who were not subject to indefinite detention).

8. Henry Weinstein, *The Supreme Court; Imprisonment of Immigrants Has Limits, Justices Rule; Law: Government Can't Indefinitely Detain Criminals Whose Native Lands Will Not Take Them Back, High Court Says*, L.A. TIMES, June 29, 2001, at A27.

9. Zadvydas v. Davis, 533 U.S. 678, 699 (2001).

showing."[10] Thus, the Supreme Court held that an alien may be detained until it has been decided that there is no significant likelihood of removal in the reasonably foreseeable future.[11]

This Comment will address the controversial issue presented in *Zadvydas*, and the Supreme Court's resolution of this issue. Part II will provide a brief background of immigration law in the United States, and will explore the divergent interpretations of the IIRIRA in the Fifth and the Ninth Circuits. Part III will explore the Supreme Court's decision in *Zadvydas v. Davis*. Part IV will address the possible judicial, societal, and legislative impact of the Court's decision.

II. IMMIGRATION LAW IN THE UNITED STATES, THE IIRIRA, AND THE INTERPRETATIONS OF THE IIRIRA IN THE CIRCUIT COURTS

A. The "Plenary Power" Doctrine and Immigration Law

The United States Constitution does not clearly place the power to control immigration with the federal government.[12] During the early nineteenth century, there was a question as to whether the states or the federal government would control immigration.[13] The Supreme Court decided that the power should lie with the federal government, partly because decisions to admit or exclude aliens may be related to foreign affairs.[14] Since then, immigration law has focused on a distinction between the legal rights of a permanent resident alien and aliens referred to as "excludable" aliens. The Fifth and Ninth Circuits have held that excludable aliens are individuals who did not enter the United States legally, and thus are considered to be standing at the border, and have little or no due process rights to be free from indefinite detention.[15] In contrast, the Supreme Court

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10. *Id.* at 701.

11. *Id.* at 702.

12. *See* U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization," and thus allowing Congress to set immigration policy).

13. Charles Weisselberg, *Prisoners of the INS*, 28 HUM. RTS. 6, 6 (2001).

14. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); *see also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (holding that in regard to immigration matters, the judiciary should defer to the executive, as long as the act of the executive is within the perimeters set by Congress). In *United States ex rel. Knauff v. Shaughnessy*, the Court explained that "the exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Shaughnessy*, 338 U.S. at 542.

15. Clay McCaslin, *"My Jailor is My Judge": Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 198 (2000); *see also* Ma v. Reno, 208 F.3d 815, 823-26 (9th Cir. 2000) (noting that the Supreme Court has repeatedly recognized that immigration laws have made a distinction between aliens who have come to our shores seeking admission and those that are in the United States, irrespective of the legality, for

has held that resident aliens, individuals that entered the United States legally and were granted the right to remain here indefinitely, are entitled to fundamental rights and due process.[16] Courts that have held that the indefinite detention of a resident alien does not violate due process have relied on the plenary power doctrine.[17] However, the plenary power or control of Congress is subject to limited judicial review in certain cases.[18]

As United States district court Judge Terry J. Hatter, Jr. wrote, "detention threatens the deprivation of a fundamental liberty interest," and triggers heightened scrutiny rather than judicial deference.[19] In *Zadvydas v. Davis*, the Supreme Court also recognized this limitation, and noted that the cases before the Court did not require a determination of the authority of the political branches to control entry into the country.[20] While acknowledging the limitation of judicial review, the Court pointed out that it was not considering terrorism or other special circumstances where arguments might be made for deference to political branches on matters of national security.[21]

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which the Court has recognized additional rights and privileges not extended to those in the first category), *vacated sub nom.* Zadvydas v. Davis, 533 U.S. 68 (2001), *amended by sub nom.* Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001).

16. Clay McCaslin, *"My Jailor Is My Judge": Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 198 (2000) (citing Reno v. Flores, 507 U.S. 292, 306 (1993); Landon v. Plasencia, 459 U.S. 21, 32 (1982); Leng May Ma v. Barber, 357 U.S. 185, 187 (1958)).

17. *See, e.g.*, Zadvydas v. Underdown, 185 F.3d 279, 295-96 (5th Cir. 1999) (noting many cases where the courts relied on the plenary power doctrine), *aff'd, modified sub nom.* Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002), *vacated by* 533 U.S. 678 (2001); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (explaining that Congress has "broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs"); Ekiu v. United States, 142 U.S. 651, 659 (1892) (stating that in the United States the power to admit and expel aliens "is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war [and] it belongs to the political department of the government"); Marisel Acosta, Comment, *"Unremovable" Criminal Resident Aliens Awaiting Deportation: Can the INS Detain Them Indefinitely?*, 73 TEMP. L. REV. 1363, 1370 (2000) (noting that the United States has plenary authority to decide when it will deny hospitality to a non-citizen); Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1059 (1999).

18. Zadvydas v. Davis, 533 U.S 678, 695 (2001) (stating that the plenary power of Congress is subject to "important constitutional limitations" and citing to *INS v. Chadha*, 462 U.S. 919, 941-42 (1983), and *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889)); *see also* Matthews v. Diaz, 426 U.S. 67, 81 (1976) (stating that any rule that would "inhibit the flexibility of the political branches of government to respond to changing world conditions" is suspect).

19. *In re* Indefinite Detention Cases, 82 F. Supp. 2d 1098, 1101 (C.D. Cal. 2000) (holding that the plenary power doctrine did not support a deferential standard of review of the petitioner's detention).

20. *Zadvydas*, 533 U.S. at 695.

21. *Id.* at 696. The Court noted that in such cases as terrorism, "special arguments" for preventive detention could be made. *Id.*

In fact, in matters of national security, courts have invoked the plenary power doctrine and deferred to the legislative and executive branches.[22] After the September 11, 2001 terrorist attacks on our nation and the detention of suspected terrorists, it will be interesting to see if a special argument for detention is brought before the Supreme Court, forcing the Court to address an issue it made clear it was not dealing with in *Zadvydas*. Regardless, the Supreme Court's decision in *Zadvydas* may be a landmark case because it "'endorses the fundamental principle of judicial review in immigration cases,'" rather than traditional judicial deference.[23]

B. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

The IIRIRA alters the INA, which authorizes the Attorney General to detain both deportable and excludable aliens during the removal period, including aliens ordered removed for committing crimes.[24] When considering the amendment to the INA, the House explained in a report, "[t]he United States is a nation of immigration. This proud tradition has been tarnished in recent decades by failures to set clear priorities in our system of legal immigration and to enact and enforce the measures necessary to prevent the rising tide of illegal immigration."[25] The House continued to explain that "[u]nlimited immigration is a moral and practical impossibility. In the words of the 1981 report of the Select Commission on Immigration and Refugee Policy, '[o]ur policy-while providing opportunity for a portion of the world's population-must be guided by the basic national interests of the United States.'"[26] The House stated that there had been a failure in immigration policy and enforcement, and began a review of immigration law.[27] The House noted that the Immigration in the National Interest Act of 1995 was originally introduced as House Bill 1915 and was later re-introduced as House Bill 2202; this Act aimed at fixing immigration problems by enacting "the most comprehensive reform of American

22. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950) (Frankfurter, J., dissenting) (explaining that Knauff was a German citizen who was excluded by the United States, even though she was married to an American army veteran, based on unsubstantiated allegations that she was a spy and thus a threat to national security).

23. David G. Savage, *Keeping the Doors Open: Court Upholds Rights for Aliens with Criminal Records*, A.B.A. J., Aug. 2001, at 34 (quoting Lucas Guttentag, who directs the ACLU'S Immigrants Rights Project and who argued the case in the Court on behalf of Enrico St. Cyr, a Haitian immigrant who had lived in the United States for 10 years, but faced deportation as a result of pleading guilty in early 1996 to selling a controlled substance).

24. 8 U.S.C. § 1231(a)(2) (2001).

25. H.R. REP. NO. 104-879, at 104 (1997).

26. *Id.* (alteration in original).

27. *Id.*

immigration policy in the past generation."[28] The House acknowledged that prior legislation, such as the Immigration Act of 1965, the Refugee Act of 1980, the Immigration Reform and Control Act of 1986, and the Immigration Act of 1990 had a great impact on immigration policy, but provisions of these laws played a role in the current problems "by failing to set clear priorities for our immigration system, and failing to provide tough sanctions against those who violate our immigration laws."[29] House Bill 2202 eventually became the IIRIRA, and contained the same detention provisions.[30] On August 4, 1995, Representative Lamar Smith introduced House Bill 2202 and referred it to the full Committee on the Judiciary and to the Committees on National Security, Government Reform and Oversight, Ways and Means, and Banking and Financial Services.[31] The Committee on the Judiciary favorably reported House Bill 2202 to the House on March 4, 1996.[32]

Between March 19 and 21, 1996, the House considered House Bill 2202 and adopted many amendments.[33] On March 21, 1996, the House rejected a motion to recommit House Bill 2202 to the Committee on the Judiciary with instructions, but "the House then passed House Bill 2202 as amended by a recorded vote of 333-87."[34] On May 2, 1996, the Senate passed House Bill 2202, but with an amendment altering the language.[35] On May 13, 1996, the Senate insisted on its amendment and requested a conference; and on September 11, 1996, the House disagreed to the Senate amendment, but agreed to a conference.[36] The House and Senate agreed to file a conference report, and the House agreed to the report by a recorded vote of 370-37.[37]

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28. *Id.* at 105.

29. *Id.* The House commented that the laws "failed to treat migration as a comprehensive phenomenon, and failed to make the tough choices on priorities that would restore credibility both to our systems of admitting legal immigrants and deterring, apprehending, and removing illegal immigrants." *Id.*

30. H.R. 2202, 104th Cong. § 305 (1995); *see also* Matthew E. Hedberg, Kim Ho Ma v. Reno: *Cloaking Judicial Activism as Constitutional Avoidance*, 76 WASH. L. REV. 669, 673-79 (2001) (explaining in-depth the legislative history of the IIRIRA).

31. H.R. REP. NO. 104-879 at 118. On September 19, 1995, House Bill 2202 was re-referred to the Committee on the Judiciary (in addition to the Committees on Agriculture, Banking and Financial Services, Economic and Educational Opportunities, Government Reform and Oversight, National Security, and Ways and Means). *Id.*

32. *Id.* (citing H.R. REP. NO. 104-469(IV), at pt. 1 (1995)).

33. *Id.* at 121.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

On September 30, 1996, the Senate agreed to the conference report, and the measure was approved by the President.[38] Former President Clinton signed the IIRIRA into law on September 30, 1996.[39]

The heart of the controversy over indefinite detention under the IIRIRA lies in Title 8 U.S.C. § 1231(a)(6), which covers the detention of excludable and deportable aliens beyond the ninety-day removal period.[40] The IIRIRA amends the INA by requiring that the Attorney General detain certain aliens after the INS ordered their removal, during the ninety-day removal period.[41] Section 241 of Title 8 of the United States Code supplements section 1231(a)(6) allowing for detention.[42] Section 241.4 applies to criminal aliens, and states that the district director may continue to detain an alien ordered removed beyond the removal period, if the alien is removable under certain sections of the Act, or if the alien demonstrates a serious risk of non-compliance with the removal order.[43] Section 241 also places the burden of proof for release after the ninety-day removal period on the alien, and requires clear and convincing evidence that the release would not be a danger to the community or present a significant flight risk.[44] Thus, absent such a showing by the alien, Congress authorizes continued detention of criminal aliens beyond a ninety-day period.

Shortly after a district court in Washington held that the continued detention of deportable aliens under Section 1231(a)(6) whose deportations were unsuccessful violated the Constitution, the INS released interim

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38. *Id.*

39. H.R. CONF. REP. NO. 104-828, at 210-11, 215-16 (1996); *see also* Matthew E. Hedberg, Note, Kim Ho Ma v. Reno*: Cloaking Judicial Activism as Constitutional Avoidance*, 76 WASH. L. REV. 669, 673-77 (2001) (explaining in-depth the legislative history of the IIRIRA).

40. 8 U.S.C. § 1231(a)(6) (2001).

41. *Id.* Section 1231(a)(3) and section (a)(4) address the supervision of aliens released after the ninety-day removal period in the United States and the removal of aliens arrested, imprisoned, on parole, on supervised release, or probation at the time removal is ordered. 8 U.S.C. § 1231 (a)(3)-(a)(4) (2001). Subsection 1231(a)(5) concerns reinstating removal orders for an alien that has illegally re-entered the country. 8 U.S.C. § 1231(a)(5) (2001).

42. 8 U.S.C. § 241 (2001).

43. 8 U.S.C. § 241.4 (2001).

44. *Id.* During this analysis, the statute requires INS district directors to take into account the following factors:

(1) [T]he nature and seriousness of the alien's criminal convictions;
(2) Other criminal history;
(3) Sentence(s) imposed and time actually served;
(4) History of failures to appear for court (defaults);
(5) Probation history;
(6) Disciplinary problems while incarcerated;
(7) Evidence of rehabilitative efforts or recidivism;
(8) Equities in the United States; and
(9) Prior immigration violations and history.

8 C.F.R. § 241.4(a) (2001).

procedures.[45] The district court's decision resulted in the release of a large number of undeportable aliens, and the interim procedures were an attempt by the INS to address due process concerns and end the court-ordered release of many aliens.[46] However, the majority of district courts continued to hold that while the language of Section 1231(a)(6) authorized the indefinite detention of aliens, the detention violated the due process rights of the aliens and was unconstitutional.[47] Further, without addressing whether the statute authorized indefinite detention, United States district court Judge Terry J. Hatter, Jr. held that the indefinite detention of deportable aliens violated the due process rights of resident aliens.[48]

C. The Fifth Circuit's Interpretation of the IIRIRA: Zadvydas v. Underdown

Kestutis Zadvydas immigrated to the United States with his parents at the age of eight, after he and his family spent the years following World War II in a displaced persons camp in Germany.[49] Zadvydas arrived in America in 1956, becoming a resident alien, but not a citizen.[50] Zadvydas' encounters with crime began at the young age of eighteen when he was convicted of attempted robbery, and the INS began deportation proceedings in 1977.[51] Zadvydas neglected to appear for an INS hearing, and the agency

45. Daniel R. Dinger, *When We Cannot Deport, Is it Fair to Detain?: An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231(a)(6) and the 1999 INS Interim Procedures Governing Detention*, 00 B.Y.U. L. REV. 1551, 1575 (2000) (citing Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999), *aff'd sub nom.* Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), *vacated sub nom.* Zadvydas v. Davis, 533 U.S. 678 (2001), *amended sub nom.* Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001)).

46. *Id.*

47. *Id.* These cases include *Kay v. Reno*, 94 F. Supp. 2d 546 (M.D. Pa. 2000); *Nguyen v. Fasano*, 84 F. Supp. 2d 1099 (S.D. Cal. 2000); *Sengchanh v. Lanier*, 89 F. Supp. 2d 1356 (N.D. Ga. 2000); *Hermanowski v. Farquharson*, 39 F. Supp. 2d 148 (D. R.I. 1999); *Vo v. Greene*, 63 F. Supp. 2d 1278 (D. Co. 1999); *Zadvydas v. Caplinger*, 986 F. Supp. 1011 (E.D. La. 1997). *Id.* at 1576, n.125.

48. *In re* Indefinite Detention Cases, 82 F. Supp. 2d 1098, 1100 (C.D. Cal. 2000) (noting that as the probability of deportation by the government decreases, so does the government's interest in detaining the alien indefinitely, and the denial of the alien's liberty becomes more severe). The Ninth Circuit later upheld Judge Hatter's ruling. *See* Henry Weinstein, *California and the West Court Bans the Indefinite Detention of Immigrants INS: Appellate Judges Overrule the Policy Under Which Convicts Who Can't Be Deported to Their Homelands are Kept in Prison Even After They've Served Their Time*, L.A. TIMES, Apr. 11, 2000, at A3 (noting that "the ruling upholds decisions by a special panel of five federal trial judges in Seattle and U.S. District Judge Terry J. Hatter in Los Angeles, who have said the INS policy violated the immigrants' rights").

49. Zadvydas v. Underdown, 185 F.3d 279, 291-92 (5th Cir. 1999), *aff'd, modified sub nom.* Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002), *vacated by* 533 U.S. 678 (2001).

50. *Id.* at 283.

51. United States v. Zadvydas, 986 F. Supp. 1011, 1014 (E.D. La. 1997), *rev'd sub nom.* Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *vacated sub nom.* Zadvydas v. Davis, 533

could not locate him for ten years.[52] However, he was arrested again, served two years in prison, and was released on parole.[53] The INS renewed its deportation proceedings, but because Zadvydas was a "stateless" person, and did not have citizenship in any other country, his removal was unsuccessful.[54] In *Zadvydas*, the Fifth Circuit founded its holding that the detention was constitutional on the principle that resident aliens do not have more constitutional rights than excludable aliens under the Constitution when the national interest is the same and the aliens have similar circumstances.[55] Like many other courts upholding indefinite detention, the Fifth Circuit relied on the plenary power doctrine requiring judicial deference.[56] In exercising what the court called judicial deference and equating the rights of resident aliens with those of excludable aliens, the Fifth Circuit held that even when an alien is legally in the country, "once he has been ordered deported, he is stripped of his constitutional rights."[57] Thus, immigrants like Zadvydas, who have been in the country since childhood, have the same constitutional protections as those who want to enter the country for the first time. Applying this rationale, the Fifth Circuit concluded that similar to excludable aliens, the continued detention of a resident alien did not violate the Due Process Clause of the Constitution.[58] If courts follow the path of the Fifth Circuit by likening permanent resident aliens with excludable aliens, even though they do not have the same constitutional rights, courts may allow Congress' sovereign immigration powers to trump the secured liberty interests of permanent residents, which some argue has no basis in either constitutional or common law history.[59]

U.S. 678 (2001), *aff'd, modified*, 285 F.3d 398 (2002 U.S. App. LEXIS 3779 (5th Cir. 2002).

52. *Id.* During this time, Zadvydas had a job, filed income taxes, and received an extension or reissuance of his green card. *Id.*

53. *Id.* at 1014-15.

54. *Zadvydas*, 185 F.3d at 283-84 (both Germany and Lithuania refused to accept Zadvydas).

55. *Id.* at 294-97.

56. *Id.* at 294 (noting that Zadvydas' detention is currently within the government's plenary immigration power).

57. Lisa Cox, Comment, *The Legal Limbo of Indefinite Detention: How Low Can You Go?*, 50 AM. U. L. REV. 725, 744-45 (2001).

58. *Zadvydas*, 185 F.3d at 296-97 (noting that there was no violation as long as good faith efforts to deport the resident alien continued and reasonable parole and review procedures existed). The Tenth Circuit has also reasoned that resident aliens are in the same position regarding due process rights as excludable aliens under the Constitution. *See* Ho v. Greene, 204 F.3d 1045, 1059-60 (10th Cir. 2000) (holding that there was no due process obstacle to the continued detention of removable aliens under the Act), *overruled in part by* Zadvydas v. Davis, 533 U.S. 678 (2001). The Tenth Circuit found that § 1231(a)(6) "is not ambiguous" and "places no time limit" on the authority of the Attorney General to detain aliens beyond the ninety-day removal period. *Id.* at 1056-57.

59. Alexandra E. Chopin, Comment, *Disappearing Due Process: The Case for Indefinitely Detained Permanent Residents' Retention of Their Constitutional Entitlement Following a Deportation Order*, 49 EMORY L.J. 1261, 1302 (2000).

D. The Ninth Circuit's Interpretation of the IIRIRA: Ma v. Reno

As a two-year old citizen of Cambodia, Kim Ho Ma lawfully entered the United States as a refugee and has lived in the United States as a legal permanent resident since the age of six.[60] However, Ma was convicted of manslaughter at the age of seventeen, which qualified him for deportation.[61] After Ma completed his prison sentence, the INS took him into custody and ordered Ma removed.[62] The INS began removal proceedings, and Ma made motions for release, but an immigration judge found Ma deportable because his release would present a danger to the community.[63] Since the United States had no repatriation agreement with Cambodia, Ma could not be removed within the ninety-day removal period during which his detention was mandatory.[64] Ma filed a petition in the United States District Court for the Western District of Washington for a writ of habeas corpus, arguing that the INS violated his due process rights by indefinitely detaining him.[65] When the Ninth Circuit heard his case, Ma had been in custody for almost five years.[66] Ma's sentence constituted about two years of that period.[67] Six months after Ma's removal order, the INS undertook its ninety day custody review to decide if it should release Ma.[68] After interviewing Ma and reviewing materials submitted by his family and friends, an INS officer prepared a report which noted that Ma's family was very supportive, and, if he was released, his brother would give him a job, and Ma could assist his handicapped father on a daily basis.[69] However, the deputy district director

60. Ma v. Reno, 208 F.3d 815, 818 (9th Cir. 2000), *vacated sub nom.* Zadvydas v. Davis, 533 U.S. 678 (2001), *amended sub nom.* Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001).

61. *Id.* at 818-19. Ma's conviction qualified him for removal as an alien convicted of particular crimes under 8 U.S.C. § 1227(a)(2). *Id.*

62. *Id.* at 818.

63. *Id.* at 818-19.

64. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(A) & (a)(6) (requiring detention).

65. *Ma*, 208 F.3d at 818-19. In the same district court, over one hundred habeas corpus petitioners challenged their continued detention by the INS in similar cases. *Id.* at 818 n.2. The district court chose five lead cases that contained issues common to all petitioners and had the parties argue those issues before five district court judges. *Id.* The five judges issued a joint order creating a legal framework to apply in each case. *Id.* A judge then applied this ruling to Ma and held that he should be released. *Id.* There have been similar cases involving a great number of habeas petitioners in Nevada and the Central, Eastern, and Southern Districts of California. *Id.*

66. *Id.* at 819.

67. *Id.*

68. *Id.*

69. *Id.* at 819-20.

denied Ma's release by form letter, which did not include any specific reasons for denial, and stipulated that the decision was not appealable.[70]

The INS reviewed its decision,[71] but determined that Ma should remain in custody because his conviction was serious, and also because of his threatened participation in a hunger strike if kept in custody.[72] The reviewers concluded that they could not find that Ma would not be violent and follow the terms of his release.[73] The district court reviewed Ma's habeas petition and held his detention unconstitutional because the court found that his detention violated substantive due process and ordered Ma released to await disposition of his appeal.[74] Both the Ninth Circuit and the Supreme Court denied the INS' attempts to stay the release order, and the INS appealed the district court's order which granted Ma's petition.[75]

In its analysis, the Ninth Circuit noted that under the statute, aliens who cannot be removed after the expiration of ninety days fall into two groups.[76] The first group must be released under supervisory regulations that require the aliens to appear regularly before an immigration officer.[77] The Ninth Circuit stated that aliens in the second group "'may be detained beyond the removal period' and, if released, shall be subject to the same supervisory provisions" as the aliens in the first group.[78] The second group includes aliens who are removable because of criminal convictions, such as Kim Ho Ma.[79] The court noted that while the statute allows for the detention of group two aliens beyond ninety days, it says nothing about how long detention is authorized beyond the ninety-day period.[80] The court concluded that "any construction of the statute must read in some provision concerning

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70. *Id.* at 820. "The letter [did state] that Ma's case would be reviewed again six months from the date of the letter . . . [and] that Ma had the right to submit a request for redetermination of his custody status at any time." *Id.* at 820 n.7.

71. *Id.* at 820.

72. *Id.*

73. *Id.* The reviewers made this conclusion despite the abundant information about Ma's relationships with his family, employment prospects, and plans to avoid gangs and criminal behavior. *Id.*

74. *Id.*

75. *Id.* at 820. After Ma and the other "petitioners prevailed in district court, the INS implemented the 'Pearson II' regulations, which provided for additional review of custody decisions. These regulations [allow] review of [the] decisions of district directors by [the] INS Headquarters, which was then done in this case." *Id.* at 820 n.8.

76. *Id.* at 821.

77. *Id.* The statute requires the aliens to provide information to the INS official, notify the INS of any alterations in their employment or residence within 48 hours, undergo medical and psychiatric testing, and obey restrictions on their travel. *Id.* (citing 8 U.S.C. § 1231(a)(3) (2000)).

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

79. *Id.* The court cited to 8 U.S.C. § 1227(a)(2) and pointed out that the criminal convictions include "drug offenses, certain crimes of moral turpitude, 'aggravated felonies,' firearms offenses, and various other crimes." *Id.* (quoting 8 U.S.C. § 1227(a)(2) (2000)).

80. *Id.* (citing § 1227(a)(2)).

the length of time beyond the removal period detention may continue, whether it be 'indefinitely,' 'for a reasonable time,' or some other temporal measure."[81] The court held that Congress did not grant the INS authority to indefinitely detain aliens like Ma, and construed the statute as allowing the INS to detain aliens only for a reasonable time after the removal period.[82] The Ninth Circuit concluded that in cases where an alien has entered the United States and there is "no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future," the statute does not allow the Attorney General to detain the alien beyond the removal period provided in the statute, and the alien must be released subject to the statutory supervision provisions.[83]

The court gave four reasons for its holding. First, the court wrote that the most important reason was that the result allowed the court to avoid determining whether or not indefinitely detaining aliens violated the aliens' due process rights.[84] Second, the court reasoned that the holding "better comport[ed]" with the statutory language and allowed the court to avoid assuming that Congress intended the harsh result of indefinitely detaining aliens without such a clear statement of congressional intent.[85] Third, the court reasoned that the interpretation of an implicit "reasonable time" limitation was consistent with the court's "case law interpreting a similar provision in a prior immigration statute."[86] Finally, the court found that its

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81. *Id.* The court pointed out that it recognized that generally the Attorney General's interpretation of the immigration laws is entitled to substantial deference, but the Court has also held this principle does not apply "where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe." *Id.* at 821 n.13.

82. *Id.* at 822.

83. *Id.*

84. *Id.* The court pointed out that the Supreme Court has held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions, which the court refers to as a "paramount principle of judicial restraint." *Id.* Also, the court noted that regarding immigration, courts have often read limitations into statutes that seemed to give broad power to immigration officials in order to avoid constitutional problems. *Id.* The court also acknowledged the Fifth Circuit's holding in *Zadvydas*, "that long-term detention of removable aliens who have been ordered deported does not violate substantive due process," and noted that although the court seriously questioned the Fifth Circuit's conclusion in that case, the court did not need to reach the constitutional question. *Id.* at 825 n.23. The court pointed out that at the very least, *Zadvydas* made it clear "that a substantial constitutional question exists regarding the construction of [section] 1231(a)(6)." *Id.* at 826 n.23.

85. *Id.* at 822. The court pointed out that the provision stating that "the INS may hold individuals 'beyond' a specified time demonstrates Congress's intent" that the agency have some flexibility where additional time may be useful, but does not demonstrate an intent "to allow the INS to hold people in detention for the remainder of their lives." *Id.* at 827.

86. *Id.* at 822. The court stated that the conclusion that a "reasonable time" limitation is implicit in the statute is supported by a line of Ninth Circuit cases holding that a "predecessor provision must

interpretation was more consistent with international law.[87] The court concluded that in Ma's case, the district court correctly concluded that there was "not a reasonable likelihood that the INS [would] be able to remove Ma to Cambodia."[88] Thus, the court concluded that without a repatriation agreement, extant or pending, the court had to agree with the district court that there was no reasonable likelihood that the INS could remove Ma, and, thus, the INS could not detain Ma any longer.[89]

III. THE SUPREME COURT'S REJECTION OF INDEFINITE DETENTION OF UNREMOVABLE ALIENS UNDER THE IIRIRA: *ZADVYDAS V. DAVIS*

Justice Breyer wrote the Court's opinion concluding that, because the Court interpreted the statute to avoid a serious constitutional threat, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.[90] The Court began the opinion by noting that the decision only addressed aliens who were admitted to the United States, but later ordered removed, and that aliens who had not yet gained admission to the United States posed a different issue.[91] The Court consolidated the two aforementioned cases, *Zadvydas* and *Ma*, in its decision in order to

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be construed as allowing only for detention 'reasonably' beyond the removal period." *Id.* at 828.

87. *Id.* at 822. The court explained that in interpreting the statute to include a reasonable time limitation, the court was also influenced by amicus curiae Human Rights Watch's argument that the court "should apply the well-established *Charming Betsy* rule of statutory construction[,] which requires that [a court] generally construe [c]ongressional legislation to avoid violating international law." *Id.* at 829-30.

88. *Id.* at 831. The court noted that although the INS presented:

> evidence that the State Department has submitted a proposal for a repatriation agreement to the Cambodian government, both sides agreed that the United States has no functioning repatriation agreement with that country, that the Cambodian government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time).

Id.

89. *Id.*; *see also* Matthew E. Hedberg, Kim Ho Ma v. Reno*: Cloaking Judicial Activism as Constitutional Avoidance*, 76 WASH. L. REV. 669 (2001) (arguing that the Ninth Circuit used constitutional avoidance as a "guise" for creating an exception to the detention statute "by forbidding the Attorney General from detaining deportable aliens beyond the removal period if the removal [could] not be accomplished in the reasonably foreseeable future").

90. Zadvydas v. Davis, 533 U.S. 678, 682, 699 (2001). The statute referred to is 8 U.S.C. § 1231(a)(6), a statute that authorizes further detention if the government fails to remove the alien during the ninety-day removal period. *Id.* at 682. The Court quoted the statute:

> "An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] 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 [certain] terms of supervision . . . ."

Id. (alterations in original) (quoting 8 U.S.C. § 1231(a)(6) (West Supp. 1994)).

91. *Id.*

resolve the split between the Fifth and Ninth Circuits.[92] Zadvydas asked the Court to review the decision of the Fifth Circuit allowing his continued detention, and the Government asked the Court to reconsider the Ninth Circuit's decision to release Ma.[93]

After explaining the Court's jurisdiction to hear the cases, the Court acknowledged that it is a basic tenet of statutory interpretation that "whenever an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[94] The Court also pointed out that it has read "significant limitations" into other immigration statutes in order to avoid finding them unconstitutional and invalidating them.[95] Applying this strategy, the Court found that the statute "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," and it does not permit indefinite detention.[96]

The Court began its analysis by pointing out that a statute which allowed indefinite detention would raise a serious constitutional problem, because the Fifth Amendment's Due Process Clause forbids the Government from depriving "any 'person . . . of . . . liberty . . . without due process of law.'"[97] The Court emphasized that the core of the liberty the Clause protects is the freedom from imprisonment, including government detention, custody, or other forms of physical restraint.[98] The Court has held that government detention violates that Clause, unless the alien's detention is ordered under certain conditions, including a criminal proceeding, with adequate procedural protections.[99] In this case, the Court found that the proceedings were civil, rather than criminal, and that they had a non-punitive purpose and effect.[100] In addition, the Court found there was not a

92. *Id.* at 684. The Court explained the histories of both detainees. *Id.* at 684-85.
93. *Id.* at 686.
94. *Id.* at 689 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).
95. *Id.*
96. *Id.*
97. *Id.* at 690 (alterations in original) (quoting U.S. CONST. amend. V).
98. *Id.*
99. *Id.* Other conditions include "special and 'narrow' non-punitive 'circumstances,' where a special justification," like a potentially harmful mental illness, "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* (citation omitted) (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).
100. *Id.*

"sufficiently strong special justification" in this case for indefinite civil detention under this statute.[101]

The Court then addressed the Government's argument that the statute had two regulatory goals: "'ensuring the appearance of aliens at future immigration proceedings,'" and "'[p]reventing danger to the community.'"[102] The Court rejected the first justification because it reasoned that "by definition," preventing the alien's flight is weak or absent when removal is a "remote possibility" at best.[103] In regard to the second justification of protecting the community, the Court stated that while its importance does not necessarily diminish over time, the Court has upheld "preventive detention" because of danger to the community only when the detention is limited to "specially dangerous individuals" and strong procedural protections exist.[104] The Court found that this case presented the possibility of permanent civil confinement, and that the provision authorizing detention did not apply narrowly to "'a small segment of particularly dangerous individuals,'" such as potential terrorists, but widely to aliens ordered removed for multifarious reasons, including tourist visa violations.[105] Thus, the Court concluded that once there is no justified flight risk, the only special circumstance is the alien's removable status, which is not related to the dangerousness of the detainee.[106]

The Court was also not persuaded that the administrative proceedings provided aliens with adequate procedural protections, when the alien had the burden of proving he is not dangerous, and there was not significant judicial review.[107] The Court was also not convinced by the Government's argument that alien status itself can justify indefinite detention.[108] The Court differentiated the main case on which the Government relied, *Shaughnessy v. United States ex rel. Mezei*, from the present case, because that case

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101. *Id.*

102. *Id.* (quoting Brief for Respondents in *Zadvydas* at 24, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791)).

103. *Id.* The Court cited to *Jackson v. Indiana*, 406 U.S. 715 (1972), where it explained that when "detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.'" *Id.* (alterations in original) (quoting *Jackson*, 406 U.S. at 738).

104. *Id.* at 691. The Court noted that in cases where preventive detention is "of potentially *indefinite* duration," the Court has also required a special circumstance in addition to the dangerousness rationale, such as mental illness, which helps to create the danger. *Id.* (citing Kansas v. Hendricks, 521 U.S. 346, 358, 368 (1997)).

105. *Id.* (quoting *Hendricks*, 521 U.S. at 368).

106. *Id.* at 691-92.

107. *Id.* at 692.

108. *Id.* at 692-93. The Government relied on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which involved a lawfully admitted alien who left the United States, returned after a trip abroad, was denied admission, and was indefinitely detained on Ellis Island, because the government was unable to find another country to accept him. *Id.* at 692. The Court in that case held that Mezei's detention was constitutional. *Id.*

involved an excludable alien who was "'treated, for constitutional purposes, 'as if stopped at the border.'"[109] The Court pointed out that the distinction between an alien who has entered "the United States and one who has never entered runs throughout immigration law."[110] The Court reiterated that established constitutional safeguards protect persons inside the United States that are unavailable to aliens outside the borders of the United States.[111] The Court concluded that upon entry into the country, the alien's legal circumstance rights change, because "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[112] Specifically, the Court noted that it has held that the Due Process Clause protects aliens that are susceptible to a final order of deportation.[113]

The Court also ultimately rejected the Government's argument that Congress has "plenary power" to establish immigration law, and that the judicial branch must yield to the decisions of the executive and legislative branches in that area.[114] The Court emphasized the fact that in the relevant cases, the Court focused upon limitations on the plenary power doctrine.[115] The Court pointed out that it did not deny the right of Congress to remove aliens, to assign them to supervision with conditions after release, or to incarcerate them for violation of those conditions.[116] In fact, the Court reiterated that the Ninth Circuit's point, that determining whether indefinitely detaining deportable resident aliens that have been removed under the IIRIRA was constitutional, did not require the Court to consider the power of the political branches "to control entry into the United

109. *Id.* at 693 (explaining that this made all the difference in the *Mezei* case) (quoting *Mezei*, 345 U.S. at 213, 215).

110. *Id.*

111. *Id.* (noting that the Fifth Amendment's protections do not extend to aliens outside the United States' boundaries).

112. *Id.*; *see also* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (concluding that "all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] [A]mendments"); *Id.* at 242 (Field, J., concurring in part, dissenting in part) ("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."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the due process and equal protection provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

113. *Zadvydas*, 533 U.S. at 693-94 (citing *Wong Wing*, 163 U.S. at 238, and noting that the nature of that protection may vary depending upon "status and circumstance").

114. *Id.* at 695.

115. *Id.*

116. *Id.* (citing 8 U.S.C. § 1231(a)(3) (West Supp. 1994)).

States."[117] Further, it did not require the Court 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 matters of national security."[118]

The Court also rejected the Government's argument that aliens had a reduced liberty interest because they did not have a legal right to live in the country.[119] The Court reasoned that it is not a choice "between imprisonment and the alien 'living at large[;]' [rather,] [i]t is between imprisonment and released supervision with conditions that may not be violated."[120] The next issue that the Court had to address was congressional intent. The Court acknowledged that, "if 'Congress has made its intent' in the statute 'clear, we must give effect to that intent.'"[121] The Court concluded that it could not find any congressional intent to grant the Attorney General the power to indefinitely detain an alien ordered removed.[122] The Court noted that the statute includes the word "may," but emphasized that this does not grant the Attorney General boundless discretion, and that "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."[123]

The Court also looked to the history of the IIRIRA, including the INA, and concluded that it found no indications of a congressional intent to permit indefinite and possibly permanent detention.[124] Thus, to avoid a constitutional problem, the Court concluded that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[125]

The Court also rejected the Government's argument that, even applying the Court's statutory limitation, a federal habeas court must believe the Government regarding whether the statutory limits had been respected in a certain case, and could conduct little or no independent review of the issue.[126] The Court concluded that the determination of whether a set of

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117. *Id.* at 696.

118. *Id.* (explaining that the Government did not explain how a court's determination of "the likelihood of repatriation, if handled with appropriate sensitivity, could make a significant difference in this case").

119. *Id.*

120. *Id.* (quoting Brief for Respondents in *Zadvydas* at 47, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791)).

121. *Id.* (quoting Miller v. French, 530 U.S. 327, 336 (2000)).

122. *Id.* at 697.

123. *Id.* (quoting to 8 U.S.C. § 1537(b)(2)(C) (West Supp. 1994) in stating that "'[i]f no country is willing to receive' a terrorist alien ordered removed, 'the Attorney General may, notwithstanding any other provision of law, retain the alien in custody' and must review the detention determination every six months").

124. *Id.* at 699.

125. *Id.*

126. *Id.*

particular circumstances satisfies the limitation of detention within reasonable time necessary to secure removal according to statutory authority is one for the courts to decide.[127] The Court reasoned that the basic federal habeas corpus statute grants the power to decide this issue to the federal courts.[128] The Court explained that this allows the courts to carry out "what this Court has described as the 'historic purpose of the writ,' namely 'to relieve detention by executive authorities without judicial trial.'"[129] The Court set guidelines for the habeas court, which must ask whether the detention at issue exceeds a reasonable period to secure removal, and "measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal."[130] Thus, the Court mandated that when removal is not reasonably foreseeable, a court should find the continued detention unreasonable and not authorized by statute.[131]

The Court acknowledged that principles of judicial review in this area recognize the primary responsibility of the executive branch and advise judges to give expert agencies decision-making leeway in areas involving their expertise.[132] Importantly, the Court pointed out that these principles require courts to listen carefully to the government's foreign policy judgments, including its judgment on the status of repatriation negotiations at issue, and "to grant the Government appropriate leeway when its judgments rest upon foreign policy expertise."[133] As previously mentioned, the Court reiterated the Ninth Circuit's point that the rejection of indefinite detention under the IIRIRA was not based on a case concerning national security or a terrorist situation, which may require more judicial

127. *Id.*

128. *Id.* (citing 28 U.S.C. § 2241(c)(3) (2001), which gives the courts the authority to decide whether detention is "in violation of the . . . laws . . . of the United States").

129. *Id.* (quoting Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring)).

130. *Id.*

131. *Id.* at 699-700 (noting that the alien's release should be conditioned on any of the different forms of supervised release as appropriate in the case, and the alien may be returned to custody if he violates any of those conditions). Likewise, the Court explained that "if removal is reasonably foreseeable, [then] the habeas court should consider the risk of the alien[] committing further crimes as a factor" that could justify confinement within that reasonable removal period. *Id.* at 700. Further, the Court recognized the Government's points that review must take "appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to 'speak with one voice' in immigration matters." *Id.*

132. *Id.* (citing Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990)).

133. *Id.*

deference.[134] Thus, after the September 11, 2001 attacks, such a case could be one where the Court would give the government the leeway for preventive detention. The Court concluded that this necessary Executive leeway will require difficult judgments, and to restrict the number of times courts will have to make these decisions, the Court found it necessary to recognize "some presumptively reasonable period of detention."[135]

In presuming a reasonable period of detention, the Court noted that an argument could be made for restricting the presumption to ninety days, but the Court doubted that when Congress adopted a ninety day removal period in 1996, it thought that "all reasonably foreseeable removals" would be successful in that time.[136] However, the Court stated that it had reason to think that Congress had doubted whether detention for more than six months was constitutional.[137] Thus, in order to ensure uniform administration in federal courts, the Court held that the presumptive period of detention was six months, and "[o]nce 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."[138] The Court further held that for the detention to remain reasonable, the longer the alien has been detained in prior post-removal confinement, the less likely removal in the "'reasonably foreseeable future'" becomes.[139] The Court explained that its holding does not mean that every alien not removed must be released after six months; rather, an alien may be held in confinement until a determination has been made that there is "no significant likelihood of removal in the reasonably foreseeable future."[140]

Thus, the majority concluded that when "[t]he Fifth Circuit held Zadvydas' continued detention lawful as long as 'good faith efforts to effectuate . . . deportation continue' and Zadvydas failed to show that deportation will prove 'impossible,'" the circuit court used a standard which seemed to require an alien seeking release to demonstrate the absence of any chance of removal, regardless of how unlikely or unforeseeable, which the Supreme Court held demanded more than its interpretation of the statute.[141] Further, the Supreme Court explained that when the Ninth Circuit required Ma's release from detention because his removal in the foreseeable future

134. *Id.* at 691.

135. *Id.* at 700-01 (noting that the Court has "adopted similar presumptions in other contexts to guide lower court determinations").

136. *Id.* at 701.

137. *Id.* (citing to Juris. Statement of United States in *United States v. Witkovich*, O.T.1956, No. 295, pp. 8-9).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 702.

was unlikely, its conclusion may have been based only on the lack of an "extant or pending" repatriation agreement without giving appropriate weight to possibly successful future negotiations.[142] Thus, the Supreme Court vacated the decisions below and remanded both cases for further proceedings consistent with its opinion.[143]

Justice Anthony M. Kennedy filed a dissent, which was joined in full by Chief Justice William H. Rehnquist and in part by Justices Antonin Scalia and Clarence Thomas.[144] Justice Kennedy explained that he dissented because he believed that the Court "reached the wrong result for the wrong reason."[145] Justice Kennedy explained how deeply he was disturbed by what he interpreted as the majority's blatant and destructive overreaching.[146] Justice Kennedy thought that the Court's holding was "a serious misconception of the proper judicial function, and it is not what Congress enacted," and that "[t]he 6-month period invented by the Court, even when modified by its sliding standard of reasonableness for certain repatriation negotiations, makes the statutory purpose to protect the community ineffective."[147]

The Justice raised an interesting point that a released alien may have less incentive to cooperate or to help expedite removal, even if released on a supervised basis, than does an alien detained at an INS facility because neither the released alien nor his family would see the urgency in helping by petitioning to other countries to accept the alien back, when the alien could easily remain indefinitely in the United States.[148] While Justice Kennedy did call the problems of the aliens "substantial," he nevertheless concluded "[t]hat is not a reason, however, for framing a rule which ignores the law governing alien status."[149]

Finally, Justice Kennedy pointed out that a removable alien "has no right under the basic immigration laws to remain in this country," and explained that "[t]he removal orders reflect the determination that the aliens' ties to this community are insufficient to justify their continued presence in the United States."[150] Justice Kennedy wrote that a condition of an alien's

142. *Id.*
143. *Id.*
144. *Id.* at 705 (Kennedy, J., dissenting).
145. *Id.* at 706 (Kennedy, J., dissenting).
146. *See id.*
147. *Id.* at 708, 725 (Kennedy, J., dissenting) (citation omitted).
148. *Id.* at 713 (Kennedy, J., dissenting).
149. *Id.* at 718 (Kennedy, J., dissenting).
150. *Id.* at 720 (Kennedy, J., dissenting).

admission to the United States is compliance to our laws, and removal is the consequence of a failure to comply.[151] Justice Kennedy did acknowledge that a removable alien has the right to be free from "arbitrary or capricious detention," but he pointed out that detaining aliens when necessary to avoid the risk of flight or danger to the community is neither arbitrary nor capricious.[152] Justice Kennedy also pointed out that the theory that aliens who have completed their prison terms are not a danger is not in harmony with the reality that a substantial risk may remain, as evaluated using the factors set forth in regulations.[153] In respect to the danger of aliens, Justice Kennedy voiced concern regarding terrorists, stating that "[u]nderworld and terrorist links are subtle and may be overseas, beyond our jurisdiction to impose felony charges."[154] The Justice found the majority's reasoning regarding terrorists flawed. Justice Kennedy found the majority's position that the release of terrorists or other special circumstances might justify heightened deference to the political branches contradictory, as the Court seemed to rely on an assessment of risk, but Justice Kennedy believed this was the same premise the Court rejected when interpreting the natural reading of the statute.[155] Justice Kennedy concluded that the procedural protection regarding detention "is real, not illusory; and the criteria for obtaining release are far from insurmountable."[156] Thus, Justice Kennedy concluded that the burden is on the alien to prove that detention is no longer justified, and he did not find this to be an unreasonable burden.[157]

Justice Scalia wrote a dissenting opinion, in which Justice Thomas joined.[158] While he agreed with the main dissent by Justice Kennedy that the statute unambiguously gives the Attorney General the power to detain criminal aliens for an unspecified time period, Justice Scalia wrote separately to express his disapproval of Justice Kennedy's suggestion that the courts may order an alien released from detention in certain cases.[159]

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151. *Id.*

152. *Id.* at 721 (Kennedy, J., dissenting) (noting that "[w]here detention is incident to removal, the detention cannot be justified as a punishment nor can the confinement or its conditions be designed in order to punish").

153. *Id.* at 714 (Kennedy, J., dissenting) (citing 8 C.F.R. § 241.4(f) (2001)).

154. *Id.*

155. *Id.* at 714-15 (Kennedy, J., dissenting).

156. *Id.* at 723 (Kennedy, J., dissenting).

157. *Id.* at 724 (Kennedy, J., dissenting) (noting that while the majority expressed concern that the regulations place the burden on the alien to show he is no longer dangerous, that question could be analyzed in a later case raising the issue). The Justice also pointed to statistics showing that between February 1999 and mid-November 2000 about 6,200 aliens were provided custody reviews before expiration of the 90-day removal period, and, of those aliens, about 3,380 were released. *Id.* (Kennedy, J., dissenting) (citing 65 Fed. Reg. 80,285 (Dec. 21, 2000); Reply Brief for Petitioners in *Ma* at 15, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 00-38)).

158. *Id.* at 702 (Scalia, J., dissenting).

159. *Id.*

Justice Scalia explained that a criminal alien ordered removed, but who cannot be removed because no other country will accept him or her, is asserting "a constitutional right of supervised release into the United States," and while "[t]his claim can be repackaged as freedom from 'physical restraint' or freedom from 'indefinite detention,' . . . it is at bottom a claimed right of release into this country by an individual who concededly has no legal right to be here. There is no such constitutional right."[160] Justice Scalia vehemently disagreed with the majority's distinction between resident and excludable aliens, as he expressed that there was "no justification why an alien under a valid and final order of removal – which has totally extinguished whatever right to presence in this country he possessed – has any greater due process right to be released into the country than an alien at the border seeking entry."[161] According to Justice Scalia, Congress clearly thought that both groups of aliens could be constitutionally detained on the same terms, because it authorized the detention of both groups in the same statutory provision.[162] Thus, because Justice Scalia thought the Court incorrectly recognized this distinction, he found no constitutional obstacle to Congress' award of discretion to the Attorney General.[163]

IV. IMPACT

A. Judicial Impact and Hopes for a Legislative Impact

1. The Reaction of the Ninth Circuit

On remand from the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit reissued, with an explicit clarification and specific amendments, its prior ruling in *Ma v. Reno*.[164] In this new opinion, the Ninth Circuit reaffirmed the district court's finding that there was no reasonable likelihood that the INS would be able to remove Ma to his home country and once again found that the INS could not detain him any

160. *Id.* at 702-03 (Scalia, J., dissenting) (emphasis omitted).
161. *Id.* at 704 (Scalia, J., dissenting) (emphasis omitted).
162. *Id.* at 704-05 (Scalia, J., dissenting) (citing 8 U.S.C. § 1231(a)(6) (2001)).
163. *Id.* at 705 (Scalia, J., dissenting).
164. 208 F.3d 815 (9th Cir. 2000), *vacated sub nom.* Zadvydas v. Davis, 533 U.S. 678 (2001), *amended sub nom.* Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001).

longer.[165] Judge Reinhardt, writing once again for the Ninth Circuit as he did in *Ma v. Reno*, held that 8 U.S.C. § 1231(a)(6) does not authorize the indefinite detention of an alien ordered removed because *Zadvydas* "essentially adopted the reasoning set forth in our opinion."[166] He pointed out that the Court found that following the issuance of the final order of removal, there is "a 'presumptively reasonable' period of six months during which the INS may continue to detain an alien it is seeking to remove," but that after that time, detention would be "lawful only if there is a 'significant likelihood of removal in the reasonably foreseeable future.'"[167] In response to the Court's remand order, Judge Reinhardt said that the Ninth Circuit was now reissuing its earlier opinion with a clarification.[168] He stressed that the panel's conclusion that it was not likely that Ma could be removed in the reasonably foreseeable future "was based, and is based, not only on the fact that there was no 'extant or pending' repatriation agreement but also on the fact that there was an insufficient showing that future negotiations were likely to lead to a repatriation agreement within the reasonably foreseeable future."[169]

Judge Reinhardt explained that the panel had reached its conclusion after a careful review of the record, including the findings of the district court, which determined that the government's attempts to create a repatriation agreement with Cambodia were merely "in an embryonic stage."[170] Further, Judge Reinhardt said that the district court noted that the U.S. government had not received a response from the Cambodian government regarding its repatriation efforts, and that the United States admitted that its ability to negotiate a repatriation agreement depended on the status of ongoing similar negotiations with Vietnam.[171] Judge Reinhardt noted that the district court found that the U.S. government had held, without any resolution, repatriation discussions with Vietnam for at least the past four years and that two other judges in the same district had found that these discussions with Vietnam offered no practical potential for success.[172] Thus, Judge Reinhardt said that the district court "concluded that there was no 'realistic chance' that Ma would be removed and that this detention was 'indefinite.'"[173]

Judge Reinhardt also clarified that the district court issued its ruling in

165. Ma v. Ashcroft, 257 F.3d 1095, 1099 (9th Cir. 2001).
166. *Id.* at 1098.
167. *Id.* (quoting *Zadvydas*, 533 U.S. at 701).
168. *Id.* at 1099.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*

Ma on September 29, 1999, at which point Ma had already been detained for more than eleven months after his final order of removal, which was well after the six-month "presumptively reasonable" period the Supreme Court established.[174] Therefore, the judge concluded that "[i]n our prior opinion, we affirmed, and we reaffirm here, the District Court's finding that, under all the circumstances, there was no likelihood of Ma's removal in the foreseeable future."[175]

Judge Reinhardt then described in detail the specific modifications the panel had made to its prior opinion in accordance with *Zadvydas*. These changes primarily involved the inclusion of the six-month "presumptively reasonable" period that the Court articulated in *Zadvydas*.[176] Lastly, the court of appeals repeated that its decision did "not leave the government without remedies with respect to aliens who may not be detained permanently while awaiting a removal that may never take place."[177] The court explained that all aliens ordered released, including Ma, must comply with the "stringent" supervision requirements of § 1231(a)(3), and any alien involved in criminal activity during this time, including violating the supervisory release conditions, can be "detained and incarcerated" as provided for in the regular criminal process.[178]

In August 2002, in *Guo Xi v. INS*, the Ninth Circuit interpreted the Supreme Court's ruling to apply to inadmissible aliens.[179] The circuit court held that the statute had the same meaning for an alien deemed inadmissible under 8 U.S.C. § 1182.[180] The court stated that since the petitioner fell within the statute and within the Supreme Court's opinion, the petitioner was entitled to supervised release upon a showing that his removal to China in the reasonably foreseeable future was unlikely.[181] The court explained that the statute applied to three classes of aliens: inadmissible aliens under § 1182, aliens ordered removed for certain violations, and aliens that pose a risk to the community or are thought unlikely to obey the removal order.[182]

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174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 1115.
178. *Id.* Under these supervisory requirements, an alien must, among other things, appear before an immigration officer regularly, provide information to that official, notify the INS of a change in employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with travel restrictions. *Id.*
179. Guo Xi v. INS, 298 F.3d 832 (9th Cir. 2002).
180. *Id.* at 834 (stating that the analysis "begins and ends with *Zadvydas*").
181. *Id.*
182. *Id.* at 835.

The court explained that although Zadvydas fell into the second category of aliens, the Supreme Court's ruling addressed the statute as a whole.[183] The circuit court explained that the issue was clear, as the Supreme Court stated that the statute "'applies to certain categories of aliens who have been ordered removed, *namely inadmissible aliens*, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons.'"[184] The court reasoned that the statute's clear text, together with the Supreme Court's "categorical interpretation," forced it to find that the opinion applies to inadmissible aliens.[185] The court also looked to Justice Kennedy's dissent for support.[186] In his dissent, Justice Kennedy stated that it "'is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class [deportable aliens] but not to another [inadmissible aliens]. The text does not admit this possibility.'"[187] The court agreed with Justice Kennedy's assessment that "'the majority's rule applies to both categories of aliens.'"[188]

Perhaps sending a message to Congress, the circuit court stated that it had the obligation to follow the Supreme Court's holding in *Zadvydas*, and that its obligation was even more important because the Court interpreted a statute that "Congress may change as it pleases."[189] The circuit court noted that if Congress desired divergent treatment for the categories of aliens, then it could amend the statute.[190] The Ninth Circuit also emphasized that this case did not present a national security situation or "'other special circumstances where special arguments might be made for forms of preventive detention.'"[191] The court acknowledged the eerie coincidence that only months after the Supreme Court coined this phrase, Congress passed the legislation that authorized mandatory detention for suspected terrorists.[192] The Ninth Circuit mentioned the legislation to emphasize the scope of its holding, but the circuit court did not articulate an opinion on this

183. *Id.* (quoting the Supreme Court in *Zadvydas* that said "'we construe the statute to contain an implicit "reasonable time" limitation, the application of which is subject to federal court review'").

184. *Id.* at 835-36 (emphasis added) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001)).

185. *Id.* at 836 (noting that courts cannot make exceptions to provisions where the legislature created none in the plain text). The court also explained that "'[i]t is [the Supreme Court's] responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Id.* (alteration in original) (quoting Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994)).

186. *Id.* at 837.

187. *Id.* (alterations in original) (quoting *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting)).

188. *Id.* (quoting *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting)).

189. *Id.* at 839.

190. *Id.* (adding that the Amendment would be subject to constitutional considerations, but a decision to alter the statute lies with the legislature, not the judiciary).

191. *Id.* (quoting *Zadvydas*, 533 U.S. at 696).

192. *Id.* This legislation is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT). *Id.*

legislation.[193] The Ninth Circuit concluded that Lin Guo Xi had spent more than six months in detention and was entitled to demonstrate in federal court that the United States could not remove him to China in the reasonably foreseeable future.[194]

2. The Reaction of the Fifth Circuit

The Fifth Circuit had to rethink its "inconsistent" decision upon remand from the Supreme Court, and did not issue its new opinion until March of 2002.[195] The circuit court reiterated the facts of Zadvydas' detention and the relevant portions of the Supreme Court's opinion. The court noted that at the time Zadvydas filed his habeas petition, he had been in INS custody for more than six months after the termination of the removal period.[196] The court also noted that at the time the district court rendered its decision, Zadvydas had been in custody for more than three years after the removal period had expired.[197] After making these points, the circuit court stated that it had considered the record, the previous opinions, and the Supreme Court's opinion, which led it to conclude that Zadvydas had "'provided good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.'"[198] The court opined that the INS had failed to rebut Zadvydas' showing, especially considering the Supreme Court's statement that "as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."[199] The court stated that its prior decision was inconsistent with the Supreme Court's opinion and that the district court's prior order releasing Zadvydas was correct.[200] Thus, the circuit court withdrew its prior opinion and affirmed the judgment of the district court.[201]

193. *Id.*

194. *Id.* at 840 (reversing and remanding to the district court for the factual determinations). The Ninth Circuit has issued several opinions referencing *Zadvydas*. *See, e.g.*, Valdivia v. INS, No. 00-16884, 2002 U.S. App. LEXIS 7273 (9th Cir. Apr. 18, 2002); Navarro v. INS, No. 01-1511, 2002 U.S. App. LEXIS 6538 (9th Cir. Apr. 8, 2002); Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002).

195. Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002), *vacated by* 533 U.S. 678 (2001).

196. *Id.* at 404.

197. *Id.*

198. *Id.* (quoting *Zadvydas*, 533 U.S. at 701).

199. *Id.* (quoting *Zadvydas*, 533 U.S. at 701).

200. *Id.* The court also explained that the INS has never informed the court that Zadvydas is or was a terrorist, that he posed a threat to national security, or that he violated any conditions of release. *Id.* at 404 n.8.

201. *Id.* at 404. The court affirmed the opinion with the modification that the district court would not prevent the INS from returning Zadvydas to INS custody based on a new showing of a

3. The Reaction of a District Court

In *Yanez v. Holder*,[202] the District Court for the Northern District of Illinois acknowledged the Supreme Court's holding in *Zadvydas*, but noted that "[u]nlike the statute at issue in [*Zadvydas v.*] *Davis*, the statute in the present case clearly indicates congressional intent to grant the Attorney General the authority to indefinitely confine an alien that is found deportable by reason of being an aggravated felon."[203] The court explained that "section 1226(c) states that the Attorney General '*shall* take into custody any alien . . .' and allows the release of an alien described in the statute '*only if* the alien is part of the witness protection program."[204] Further, the court pointed out that unlike § 1231, which uses the term "may" and gives discretion to the Attorney General in making his or her determination of release, the section at issue in this case "clearly mandates detention and specifically states when release may take place."[205] In addition, the court pointed out that unlike the alien in *Zadvydas*, in the instant case there was no indication that there was no significant likelihood of removal of the aliens in the reasonably foreseeable future, because there was no indication that the aliens in the instant case could not be removed to another country.[206] The court also acknowledged that, as the Supreme Court noted in *Zadvydas*, aliens held under § 1226 have a "foreseeable detention termination point," and aliens held under § 1231 do not, thus the court held that *Zadvydas* did not control the present case.[207]

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substantial likelihood of removal in the reasonably foreseeable future or from modifying his release conditions on the same basis. *Id.* Over a year after the Supreme Court's decision in *Zadvydas*, this is the only opinion issued by the Fifth Circuit citing *Zadvydas*, except for a citation in a concurring opinion. *See* United States v. Johnston, 258 F.3d 361, 372 (5th Cir. 2001).

202. 149 F. Supp. 2d 485 (N.D. Ill. 2001).

203. *Id.* at 494.

204. *Id.* (quoting 8 U.S.C. § 1226(c) (2001)).

205. *Id.*

206. *Id.* at 494-95.

207. *Id.* at 495. Over a year later, the district courts in the Fifth Circuit have applied and followed *Zadvydas* in four cases. *See* Lewis v. U.S. DOJ, No. 02-1190ST, 2002 U.S. Dist. LEXIS 12893 (E.D. La. July 10, 2002); Serrano v. Estrada, 201 F. Supp. 2d 714 (N.D. Tex. 2002); Okwilagwe v. INS, No. 3-01-CV-1416-BD, 2002 U.S. Dist. LEXIS 3596 (N.D. Tex. Mar. 2, 2002); Malainak v. INS, No. 3:01CV1989-P, 2002 U.S. Dist. LEXIS 191 (N.D. Tex. Jan. 8, 2002). In the last year, district courts in the Fifth Circuit have distinguished *Zadvydas* in six cases. *See* Zheng v. INS, 207 F. Supp. 2d 550 (E.D. La. 2002); Vera v. Estrada, No. 3-01-CV-1044-X, 2001 U.S. Dist. LEXIS 17790 (N.D. Tex. Oct. 31, 2001); Rollaro-Suarez v. Pratt, No. 3-01-CV-1419-G, 2001 U.S. Dist. LEXIS 17764 (N.D. Tex. Oct. 31, 2001); Hernandez-Nodarse v. United States, 166 F. Supp. 2d 538 (S.D. Tex. 2001); Fernandez-Fajardo v. INS, 193 F. Supp. 2d 877 (M.D. La. 2001); Beltran-Leonard v. INS, No. 3:00CV2142-G, 2001 U.S. Dist. LEXIS 14982 (N.D. Tex. Aug. 15, 2001). Over the last year, district courts in the Ninth Circuit have cited to *Zadvydas* in seven cases. *See* Lema v. INS, 214 F. Supp. 2d 1116 (W.D. Wash. 2002); Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002); Khan v. Fasano, 194 F. Supp. 2d 1134 (S.D. Cal. 2001); Vanegas v. Smith, 179 F. Supp. 2d 1205 (D. Or. 2001); Singh v. Ashcroft, No. C 01-03920 WHA, 2001 U.S. Dist. LEXIS 17895 (N.D. Cal. Oct. 19, 2001); Perez v. Demore, No. C 00-4628 CRB, 2001 U.S. Dist. LEXIS 13763

4. Dislocation in the Balance of Powers Between the Judicial and Executive Branches?

As evidenced by the Ninth Circuit in *Guo Xi* and the district court in *Yanez*, courts are now applying the reasoning of the *Zadvydas* decision and are closely analyzing the intent of Congress. In his dissent, Justice Kennedy opined that the Court had interpreted the statute with disregard of congressional intent by creating a statutory amendment, and thus committed a "grave constitutional error."[208] While the majority claimed to have avoided a constitutional question as required by canons of statutory construction, Justice Kennedy found that the ruling caused a "systematic dislocation in the balance of powers" because the Court used the "guise of judicial restraint" to intrude on the other branches.[209] This is a similar criticism that the Ninth Circuit faced after it rendered its decision in the *Ma* case. Many legal enthusiasts awaited the Ninth Circuit's ruling and were disappointed by the circuit court's conclusion that the Attorney General could not indefinitely detain the deportable aliens beyond the statutory removal period if the removal could not be accomplished in the reasonably foreseeable future. Arguing that the *Ma* court misconstrued the IIRIRA by creating an exception to the discretion of the Attorney General, one writer accused the circuit court of rewriting the plain language of the statute under the guise of constitutional avoidance.[210] Acknowledging that constitutional avoidance is proper when a statute is ambiguous, the author asserted that the *Ma* case did not present such an opportunity because the IIRIRA clearly allowed for detention after the removal period of criminal aliens who could present a threat of danger or flight risk.[211] Thus, the Supreme Court's decision in *Zadvydas* leaves legal scholars to wonder whether the Court did disrupt the balance of powers as Justice Kennedy postulated, or whether the Court followed the assertion of Chief Justice Hughes, in *NLRB v. Jones &*

(N.D. Cal. Aug. 21, 2001); Hoa Cao v. INS, 189 F. Supp. 2d 1082 (S.D. Cal. 2001).

208. Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting) (arguing that the Court's error was giving the judicial branch the power to "summon high officers of the Executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers" and possibly releasing hundreds of aliens that could present a flight risk or danger to the community).

209. *Id.*

210. Matthew E. Hedberg, Kim Ho Ma v. Reno*: Cloaking Judicial Activism as Constitutional Avoidance*, 76 WASH. L. REV. 669, 669-70 (2001) (arguing that the *Ma* court's statutory interpretation was neither in harmony with the plain language of the statute, nor with the intent of Congress).

211. *Id.* (finding that the circuit court "cloaked its activist decision in the chameleon-like legitimacy of constitutional avoidance").

Laughlin Steel Corp., that "[t]he cardinal principle of statutory construction is to save and not to destroy."[212]

Judges voiced concerns regarding the interpretation of laws and the powers of the separate branches as early as 1825.[213] A judge once wrote that "the constitution may furnish a rule of construction, where a particular interpretation of a law would conflict with some constitutional principle; and such interpretation, where it may, is always to be avoided."[214] Furthermore, he wrote that "the oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest; for instance . . .[to prevent] the Supreme Court from attempting to control the legislature."[215] To interpret statutes, courts mainly apply the plain-meaning approach to remain true to the intent of Congress.[216] As Justice Breyer stated, if Congress' intent in the statute is "'clear, we must give effect to that intent.'"[217] Following the plain-meaning approach requires a court to refrain from altering the statute by reading words or elements into the language that are not present on its face.[218] The Supreme Court has pointed out that it is bound by the purpose of Congress as well as the means it chose to carry out its purpose.[219] An important tool for interpreting a statute is constitutional avoidance, which is used to avoid constitutional questions when the plain meaning of the statute or congressional intent is unclear.[220] If the court does

212. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

213. Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825).

214. *Id.* at 353 (Gibson, J., dissenting).

215. *Id.* at 344-58 (Gibson, J., dissenting).

216. INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) ("[I]f the language of a statute is clear, that language must be given effect – at least in the absence of a patent absurdity."); *see also* RICHARD S. KAY ET AL., CONSTITUTIONALISM (Larry Alexander ed., 1998); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (arguing that "foundationalism is a flawed strategy for theorizing about statutory interpretation and that a more modest approach, grounded upon 'practical reason,' is both more natural and more useful"); Martin S. Flaherty, *Symposium: The Cannon(s) of Constitutional Law: Aim Globally*, 17 CONST. COMMENT. 205 (2000) (containing an interesting commentary on constitutional law in America).

217. Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (quoting Miller v. French, 530 U.S. 327, 336 (2000)).

218. Bates v. United States, 522 U.S. 23, 29-30 (1997) (noting that when Congress includes certain language in a section of a statute but excludes it from another section, it is generally presumed that Congress did so intentionally and purposely).

219. MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 231 n.4 (explaining that the Court and the FCC are both bound "not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.").

220. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 575 (1988) (explaining that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). The Court noted that this principle has been applied for so long that it is no longer possible to debate it. *Id.* The Court further explained that "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'" and that the approach reflects the concern that

decide to engage in a constitutional inquiry regarding a statutory provision, it is obliged to follow the "doctrine of severability," meaning that the court should not invalidate more of a statute than is essential to eradicate its "unconstitutional taint."[221] According to Justice Breyer, *Zadvydas* required employing the tool of avoidance, as he argued that the Court could not find "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."[222] The Court found the use of the word "may" in the statute as suggesting discretion, but not necessarily unlimited discretion, and concluded that there was nothing in the history of the statute that clearly indicated a congressional intent to authorize indefinite and possibly permanent detention.[223]

Traditional principles of immigration law led many court watchers and Justice Kennedy to conclude that the Court should have deferred to the judgment of Congress. It is a well-established axiom in immigration law, and one acknowledged by the Court, that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."[224] In fact,

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constitutional issues should not be unnecessarily confronted and "also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* (quoting Hooper v. Cooper, 155 U.S. 648, 657 (1895)).

221. *See* Erika M. Anderson, *A Man Without a Country: When the Inability to Deport Becomes a Life Sentence*, 24 HAMLINE L. REV. 390, 405 (2001) (explaining that exceeding this limitation would incorrectly frustrate the legislative intent underlying the statute, and thus the "doctrine of severability" invalidates and eliminates the unconstitutional facets of the statute while rescuing the force of the statute).

222. *Zadvydas*, 533 U.S. at 695 (explaining that if Congress had meant to have authorized the long-term detention of unremovable aliens it could have written the statute more clearly).

223. *Id.* at 695-98 (concluding that as a consequence, once removal is not reasonably foreseeable, continued detention is not authorized by the statute). The Court pointed out that before 1952, lower courts had interpreted the Immigration Act of 1917 to mean that deportation-related detention must end within a reasonable time, and from the early 1950's to 1980's, the Immigration and Nationality Act of 1952 allowed, but did not require, post-deportation-order detention for up to six months. *Id.* The Court explained that in early 1996, Congress then expanded the group of aliens subject to mandatory detention and later that year Congress enacted the present law, which liberalized the past law by shortening the removal period from six months to ninety days. *Id.*

224. Mathews v. Diaz, 426 U.S. 67, 81 (1976) (explaining that because decisions in immigration may involve relations with foreign powers, and because "a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary"); *see also* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (stating that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens") (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (finding that congressional apprehension of foreign or internal dangers

the Supreme Court has acknowledged that the IIRIRA includes many provisions providing for judicial deference to the Executive's discretion.[225] However, as one writer pointed out, Congress' plenary power over immigration "does not mean that Congress may ignore all constitutional limitations when structuring the removal of aliens."[226] Justice Breyer recognized this truism of immigration law and stated that the Court would take account of the "greater immigration-related expertise of the Executive Branch."[227] However, the Court concluded that courts are capable of taking such matters into account without "abdicating their legal responsibility to review the lawfulness of an alien's continued detention."[228] The Court conceded that the executive branch has primacy in foreign policy matters, which requires courts to carefully listen to the government's judgments (including the status of repatriation negotiations) and requires the courts to give the government proper leeway regarding its judgments based on its foreign policy expertise.[229] Appreciating that giving the executive branch suitable leeway required making difficult judgments, the Court decided to limit the occasions entailing them by recognizing a presumptively reasonable period of detention.[230] Since the Court found some evidence that Congress doubted the constitutionality of detention beyond six months, and to encourage uniform administration in federal courts, the Court recognized the six-month period.[231]

The approach the Court took could be referred to as "modern avoidance," which entails that where an "'otherwise acceptable construction

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short of war constitutes a valid basis for exercise of Congress' alien deportation powers). The Court further explained that Supreme Court cases "'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.*'" *Fiallo*, 430 U.S. at 792 (emphasis added) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953).

225. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 485-86 (1999) (stating that "*many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation").

226. Gerald L. Neuman, *Symposium: Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1990 (2000). The author concluded that attorneys and judges bear the burden of reminding the government that its jurisdictional power has limits and to "reconcile a series of statutory provisions with each other and with the Constitution." *Id.* at 1998.

227. *Zadvydas*, 533 U.S. at 700 (continuing to explain that the Court would also take into account the serious administrative needs and concerns of the effort by the INS to enforce the statute, as well as the need of the Nation to "speak with one voice" on immigration matters).

228. *Id.* (explaining that typical principles of judicial review in immigration law acknowledge the primary responsibility of the executive branch). The same principles also advise judges to give the expert agencies leeway in decision-making regarding matters involving their expertise. *Id.*

229. *Id.*

230. *Id.* at 700-01. The Court emphasized that it has adopted similar presumptions in other cases in order to guide lower courts, and cited to *Cheff v. Schnackenberg*, 384 U.S. 373, 379-80 (1966), and *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58 (1991). *Id.* at 701.

231. *Id.* (finding evidence of Congress' doubt in the Juris. Statement of United States in *United States v. Witkovich*, O.T. 1956, No. 295, pp. 8-9).

of a statute would raise serious constitutional problems,'" the Court will interpret the statute to avoid the problems unless that interpretation is clearly contrary to Congress' intent.[232] While the more traditional avoidance employed by courts required the court to find that one possible interpretation would be unconstitutional, modern avoidance only requires that the court decide that one possible interpretation might be unconstitutional.[233] Constitutional law professor Bernard James described the Court's conclusion as a "classic statutory 'dance' of the type the Justices perform when the intention of Congress is not clear."[234] Recognizing the plenary power of Congress in the area, Professor James postulated that the Court "at best – is providing a backdrop for future legislation on the subject. 'Clarity' – if it comes to this provision in the INA Act—will come from Congress and will likely involve codification of Part I of Justice Kennedy's dissent."[235]

5. Will Congress Respond?

Many immigration attorneys are hoping that Congress will respond. A statement released by the American Immigration Lawyers Association acknowledged that the Supreme Court's decision was an important victory, but also emphasized that "only Congress can ensure that our laws do not allow the same or similar injustices to occur to other immigrants."[236] Judy Rabinovitz, senior staff counsel for the Immigrants Rights Project of the American Civil Liberties Union (ACLU), suggested that the Supreme Court's decision might force Congress' hand, as the ruling "really put the spotlight on immigrant detention."[237] Congress might also be motivated to

232. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

233. *Id.* (noting that the traditional and modern approaches correspond to what have been referred to as narrow and broad approaches and citing to Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1 (1996)).

234. E-mail from Bernard James, Professor of Law, Pepperdine University School of Law, to Megan Peitzke, student, Pepperdine University School of Law (Nov. 8, 2001, 10:43 PST) (on file with author).

235. *Id.* Professor James specializes in constitutional law and has served as the First Amendment contributing editor of the ABA Preview Journal, which reviews U.S. Supreme Court cases. He writes for the National Law Journal regarding First Amendment issues and lectures in the United States and Canada on constitutional material. He also serves as a commentator for the national and local media to discuss decisions of the Supreme Court. More information on Professor James is available at http://law.pepperdine.edu/campcom/faculty/james/.

236. Daniel C. Vock, *U.S. Should Follow High Court Ruling on Aliens, Lawyers Say*, CHI. DAILY L. BULL., July 20, 2001, at 1.

237. Larry Margasak, *Court Nixes Open-Ended Jail Terms*, ASSOCIATED PRESS, June 28, 2001,

respond due to embarrassment or anger that an area of law that it has enjoyed such broad power over was infringed on or usurped by the judiciary. In fact, one legal scholar said that the Court was "'defying the will of Congress.'"[238] Another writer interpreted the Court's ruling as having "sent a clear message to Congress and the executive branch that there are limits to their power to control immigration even when anti-immigration sentiment runs high."[239] Further, a legal scholar accused the Court of "'creating all sorts of substantive due process rights for aliens not thought to exist before.'"[240] Georgetown University law professor Alex Aleinikoff, formerly of INS general counsel, seemed to agree that the case changed immigration law, as he pointed out that in the last one hundred years "the [C]ourt has said Congress has full power in immigration law. This decision implies that . . . we apply the same standard to immigrants as to U.S. citizens."[241] However, others, like attorney George A. Cumming, Jr., who filed an amicus brief supporting the aliens on behalf of a number of immigration law professors, thought that there was "a lot of deference even in this opinion to the primacy of the political branches."[242] Lucas Guttentag, director of the ACLU's Immigrants Rights Project, asserted that the ruling sent an "unmistakable message to Congress that it went too far in 1996" and that "Congress should now heed the [C]ourt's message and repeal the remainder of the 1996 laws that compel the detention and deportation of immigrants who have committed minor crimes."[243] It has been reported that Congress was considering legislation before September 11, 2001 that would have relaxed restrictions that it had imposed by the IIRIRA; however, after the terrorist attacks, it is possible that non-citizens will face an even tougher time.[244]

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available at 2001 WL 24030154.

238. *Id.* (quoting Richard Samp of the conservative Washington Legal Foundation, who also said that Congress had "'changed the law in 1996 to tighten up restrictions on criminal aliens'" and the Court had used the case to "'rewrite the laws in a manner that was more favorable to immigrants than prior laws'"). In another article, Richard Samp advocated that the Court had "'greatly expanded the . . . rights of aliens, saying they have the same ones as citizens'" and it was "'kind of a slap in the face of Congress.'" Charles Lane & Hanna Rosin, *Court Limits Detention of Immigrants; Justices Rule Convicts Can't Be Held Indefinitely*, WASH. POST, June 29, 2001, at A1.

239. Marcia Coyle, *Court Trims Congress' Sails on Immigrants*, NAT'L L.J., July 9, 2001, at A1.

240. *Id.* (quoting Richard Samp of the conservative Washington Legal Foundation).

241. Charles Lane & Hanna Rosin, *Court Limits Detention of Immigrants; Justices Rule Convicts Can't Be Held Indefinitely*, WASH. POST, June 29, 2001, at A1.

242. Marcia Coyle, *Court Trims Congress' Sails on Immigrants*, NAT'L L.J., July 9, 2001, at A1 (quoting George A. Cumming, Jr. of San Francisco's Brobeck, Phleger & Harrison, who disagreed with the dissenters in the case and thought that the majority's "significant likelihood" test would not be too hard for courts to apply).

243. Press Release, ACLU, In Second Victory for Immigrants' Rights, High Court Says INS Cannot Indefinitely Jail Immigrants (June 28, 2001), *available at* http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=7339&c=95&Type=s. Lucas Guttentag also argued the judicial review cases that the Supreme Court heard. *Id.*

244. Stanley Mailman & Stephen Yale-loehr, *As the World Turns: Immigration Law Before and After Sept. 11*, 226 N.Y. L.J. 3 (2001).

Whether or not Congress heard the message and will amend or repeal the Act still remains to be seen, but after the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act, the detention of immigrants after September 11, 2001, and the alleged usurpation of Congress' plenary power, it is more probable than not that Congress will act.

B. Social Impact

1. The Immediate Effects of the Court's Decision in *Zadvydas*

As Judy Rabinovitz explained it, the Court's ruling "casts doubt on all sorts of INS detention practices and gives hope to thousands of immigrants and legal residents."[245] Jayashri Srikantiah, an ACLU attorney who represented Ma in district court, feels that the Court's ruling is a "profound reminder that the constitutional right to freedom from detention applies to citizens and non-citizens alike."[246] The impact of the Supreme Court's decision emerged as quickly as August of 2001, when the INS announced it had released 359 foreign nationals who were not considered dangerous to the community, but who were released under strict conditions of supervision in order to comply with the ruling.[247] Disturbingly enough, it has been reported that U.S. Attorney General John Ashcroft has said that "most of the 3,400 detainees eligible for release under the [C]ourt ruling would not be freed."[248] Further, in response to the Supreme Court's decision, the Department of Justice formally invoked its statutory authority and required the Secretary of State to cease issuing visas to Guyanese citizens, subjects, nationals and residents because of that country's failure to accept the return of nationals whose deportation has been ordered.[249] The Department of Justice also

245. Press Release, ACLU, In Second Victory for Immigrants' Rights, High Court Says INS Cannot Indefinitely Jail Immigrants (June 28, 2001), *available at* http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=7339&c=95&Type=s. According to Rabinovitz and the ACLU, there are more than 3,000 nationally who are similarly situated to Ma. *Id.*

246. *Id.* (explaining that it does not make sense to punish people by locking them up for life simply because they cannot return home).

247. *Ruling Leads to INS Detainees' Release*, ASSOCIATED PRESS, Aug. 6, 2001, *available at* 2001 WL 26177011. The *Miami Herald* reported that Cuban convicts and asylum seekers will remain in custody because the Supreme Court's decision does not extend to them (most, about 1,700, are Cuban detainees that arrived during the Mariel boatlift and were later convicted), and they remain in detention because they are not part of the 1984 repatriation agreement between Cuba and the United States that allowed 2,746 Cubans to be repatriated. *Id.*

248. *Id.*

249. Press Release, Department of Justice Immigration and Naturalization Service, Department of

responded to the Court's decision by publishing an interim rule in the Federal Register that amended the INS' procedures governing the review process of aliens subject to a final order of removal or deportation.[250] Although the Department created the interim rule to comply with the criteria set forth in *Zadvydas*, the rule also allows for the INS to detain aliens who are not reasonably likely to be removed in the reasonably foreseeable future under special circumstances, such as terrorism concerns.[251] While legal scholars and immigrants disturbed by Ashcroft's reported remarks await the reaction of Congress to *Zadvydas*, the ACLU and a group of civil rights advocates, religious leaders, immigrants' rights activists, and labor organizations are seeking passage of the Immigrant Fairness Restoration Act of 2001, which would reform INS detention practices for all immigrants and ensure that immigration laws "do not change the rules in the middle of the game."[252]

2. The Bigger Picture: Immigration Law Before and After September 11th

Before September 11, 2001, the Supreme Court rendered two decisions that seemed to protect immigrants. In *INS v. St. Cyr*,[253] the Court disagreed with the INS' application of the deportation provisions of the IIRIRA. While the INS argued that the IIRIRA took away its discretion to waive the deportation of long-time permanent residents even for earlier convictions, the Court disagreed. The Court held that the IIRIRA did not deprive a court of jurisdiction to review an alien's habeas petition, and that provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the IIRIRA, which repealed discretionary relief from deportation, did not apply

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Justice Imposes Sanctions on Government of Guyana for Refusing to Accept Repatriation of Its Citizens, (Sept. 7, 2001), *available at* 2001 WL 1039657.

250. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001) (to be codified at 8 C.F.R. pts. 3 & 241); *see also* Press Release, Department of Justice Immigration and Naturalization Service, Justice Department Implements Zadvydas v. Davis Supreme Court Decision (Nov. 14, 2001), *available at* 2001 WL 1432070.

251. Press Release, Department of Justice Immigration and Naturalization Service, Justice Department Implements Zadvydas v. Davis Supreme Court Decision (Nov. 14, 2001), *available at* 2001 WL 1432070. Section 241.14(d) mandates that the INS "*shall* continue to detain an alien whose release would pose a significant threat to the national security or a significant risk of terrorism." Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,973 (Nov. 14, 2001) (to be codified at 8 C.F.R. pts. 3 & 241) (emphasis added). The rule in its entirety can be found at http://www.access.gpo.gov.

252. Press Release, ACLU, In Second Victory for Immigrants' Rights, High Court Says INS Cannot Indefinitely Jail Immigrants (June 28, 2001), *available at* http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=7339&c=95&Type=s; *see also* Letter from Laura W. Murphy & Timothy H. Edgar, Director and Legislative Counsel of the ACLU respectively, to Edward M. Kennedy, United States Senator (May 21, 2001), *available at* http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=280&c=95.

253. 533 U.S. 289 (2001).

retroactively to the respondent, who had pled guilty to the indictment before Congress enacted the statute.[254] The Supreme Court later rendered the *Zadvydas* decision, which extended the protection of immigrants, but the Court also included the "special circumstance exception." As one writer pointed out: "Despite having taken important steps toward recognizing the individual rights of aliens living within U.S. borders, the Court continues to preserve exceedingly broad discretion for Congress and the Executive on immigration matters. A close reading of the Court's opinion in *Zadvydas* uncovers deferential language that inadequately protects detainees."[255] Congress also acted several times during 2000 and 2001 to create a more flexible immigration policy, such as increasing the annual number of aliens allowed temporary status for working in a specialty occupation and allowing certain prospective immigrants entry into the U.S. under temporary status while they awaited processing of their permanent residency applications.[256]

Unfortunately, after September 11, 2001, the protection of immigrants and especially of resident aliens has diminished. The aforementioned interim rule published by the Department of Justice in reaction to the *Zadvydas* ruling provides great leeway for the government to detain "suspected terrorists," rationalized as a "special circumstance" as the Court suggested.[257] The interim rule explains that in any case where the basis of

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254. *Id.* at 308-15 (explaining that because the respondent entered a guilty plea prior to the enactment of the statute, he became subject to deportation, and he became eligible for a discretionary waiver of that deportation pursuant to the prevailing interpretation of § 212(c)). Similar to its decision in *Zadvydas*, the Court placed great emphasis on the need for Congress to express its intent clearly, explaining that "when a particular interpretation of a statute invokes the outer limits of Congress' power, [the Court] expect[s] a clear indication that Congress intended that result." *Id.* at 300. In absence of such intent, the Court is obligated to interpret the statute to avoid constitutional problems. *Id.*

255. *Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1917 (2002).

256. Stanley Mailman & Stephen Yale-loehr, *As the World Turns: Immigration Law Before and After Sept. 11*, 226 N.Y. L.J. 3 (2001) (pointing out that the administrations of George W. Bush and Vicente Fox joined together to promote a safer stream of migrants across the border by creating an improved program for temporary workers); *see also* Stanley Mailman & Stephen Yale-loehr, *New Law: Higher H-1B Visa Numbers, Fewer INS Delays*, 224 N.Y. L.J. 78 (2000); Stephen Yale-loehr, Christina Sherman, Christoph Hoashi-Erhardt, & Brian Palmer, *T, U and V Visas: More Alphabet Soup for Immigrant Practioners*, 6 BENDER'S IMMIGR. BULL. 113 (2001).

257. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,972 (Nov. 14, 2001) (to be codified at 8 C.F.R. pts. 3 & 241) (explaining that the rule has been written to allow for continued detention when there is not a significant likelihood of removal in the reasonably foreseeable future in four situations, one of which is national security and terrorism concerns). In addition, the INS passed an interim regulation at the request of the Attorney General that extended the period that the INS could detain an alien while deciding whether to file charges or not from twenty-four to forty-eight hours. *See* Suzanne Gamboa, *INS Changes Rules on Immigration*, ASSOCIATED PRESS, Sept. 18, 2001, *available at* 2001 WL 27338054 (quoting Jeanne Butterfield,

the alien's final order for removal is unrelated to terrorism or national security, an immigration officer will interview the alien, who may have legal representation and present any relevant evidence on his or her behalf.[258] The Department of Justice continued to explain that this situation will arise if an alien is ordered removed for overstaying a student visa and the government has information indicating that the alien's release would present a "significant threat to the national security or a significant risk of terrorism."[259] The rule provides that based on the Commissioner's recommendation and the recommendation of the Director of the Federal Bureau of Investigation, the Attorney General personally decides whether to certify that the alien should not be released because he or she poses a significant threat to national security or a risk of terrorism.[260] The rule acknowledges that detention based on suspected terrorism requires a "predictive judgment" based upon past or present conduct and a wide variety of circumstances; thus the Attorney General is in the best position to assess an alien's due process interests and weigh them against national security concerns.[261] The Department of Justice concluded that the Attorney General should have the "personal responsibility" to make the final decision to detain the alien beyond the presumptively reasonable six month period based on terrorism concerns because of his relationship with the intelligence community and based on the "broad delegation of discretionary authority" that Congress granted the Attorney General in the Act.[262]

With the publication of its interim rule, the Department of Justice laid the foundation for detaining aliens under the category of release presenting a risk of terrorism. While it is not possible to know whether the group of 548 aliens detained by the Department of Justice on immigration charges after the terrorist attacks includes resident aliens who have been ordered deported, because the Department will not release the list of detainees, the attacks have definitely impacted immigrants in general and possible future court cases.[263]

American Immigration Lawyers Association executive director, who found the new period reasonable, but cautioned, "As to what is reasonable beyond that, we need to exercise some caution [and] [o]bviously the slippery slope here is indefinite detention").

258. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,973 (Nov. 14, 2001) (to be codified at 8 C.F.R. pts. 3 & 241).

259. *Id.*

260. *Id.* (explaining that the rule also provides that prior to certification, the Attorney General must order any further hearings or review proceedings as appropriate under the circumstances).

261. *Id.* (concluding that the Department included the provisions for continued detention because cases may arise where the Attorney General finds that it would be irresponsible to release the alien awaiting removal from detention "because the release would result in serious damage to the national security or pose an imminent threat of terrorism").

262. *Id.*

263. Attorney General Ashcroft, Speech on the Total Number of Federal Criminal Charges and INS Detainees (Nov. 27, 2001), *available at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm. The Attorney General pointed out that the amount of 548 detainees

A Washington attorney who practices before the Supreme Court summarized the change before and after September 11 when he stated that, "it is inconceivable that the case would come out the same way today . . . . Any focus by the [C]ourt on civil liberties . . . may be sharply curtailed as the [J]ustices give more deference to government officials."[264] A comment by Supreme Court Justice Sandra Day O'Connor may indicate he is right, as she explained that after the attacks "we're likely to experience more restrictions on our personal freedom than has ever been the case before."[265] Immigrants of all types face the greatest threat to their personal liberties, as the Attorney General proclaimed that the "Department of Justice is waging a deliberate campaign of arrest and detention to protect American lives."[266] The Attorney General also stated that it would "use every constitutional tool to keep suspected terrorists locked up."[267] In response to the Department's deliberate campaign of arrest and detention, the ACLU joined twenty-two organizations in filing suit on December 5, 2001 against the Department of Justice.[268] The organizations filed a Freedom of Information Act (FOIA) suit in an attempt to have a court order the Department to release documents relating to the detainees because the groups believe that the government has already decided that most of the detainees are not connected to terrorism, and there is no longer a national security rationale for withholding information.[269] Also, the Center for Constitutional Rights is preparing a class-action suit on behalf of detainees based on claims of deprivation of liberty, violations of due process, and other claims regarding the conditions of the jailhouses.[270] Considering that the Supreme Court suggested only that the INS could continue to detain a certain category of aliens in special

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suspected of terrorism does not seem so large a number when one considers that the INS currently has 20,000 people in detention awaiting deportation. *Id.*

264. Lyle Denniston, *Detentions in Terror Probe May Reach Supreme Court*, BOSTON GLOBE, Sept. 30, 2001, at A9.

265. *Id.*

266. Attorney General Ashcroft, Speech on the Total Number of Federal Criminal Charges and INS Detainees (Nov. 27, 2001), *available at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm. The Attorney General elaborated that the Department was removing "suspected terrorists who violate the law" in order to prevent terrorist attacks in the future, and announced that it had "al Qaeda membership" in custody. *Id.*

267. *Id.*

268. Ctr. for Nat'l Sec. Studies v. Dep't of Justice, No. 01-2500 (D.D.C. Dec. 5, 2001), *available at* http://www.dcd.uscourts.gov/01-2500.pdf.

269. *Id.* (noting that on October 25, 2001, the Attorney General announced that the "anti-terrorism offensive ha[d] arrested or detained nearly 1,000 individuals as part of the September 11 terrorism investigation").

270. Jim Edwards, *Rights Organizations Document Cases of "Indefinite" N.J. Detention of Aliens*, N.J. L.J., Mar. 18, 2002, at 3.

circumstances like terrorism, it is likely that the Court will have to set rules for when other immigrants, like the 548 in INS custody, can be continuously detained, and it will have to decide whether the Attorney General used constitutional tools or not. However, until those rules are clarified, people like Mohammed Nofal serve as a prediction of the fate that may await the recent detainees. Nofal is a Palestinian who is stateless and has been in jail for four and one-half years waiting to be deported.[271] One immigration specialist explained that "[t]he people who will be in trouble are from the countries with which INS has had great trouble repatriating their citizens."[272] Perhaps Nofal himself captured the impact of September 11th best when he said, "'When I heard about the case, I thought, "Thank God, I won't have to die here." But nothing has changed.'"[273]

Besides the special circumstances exception carved out in the *Zadvydas* decision and the Department of Justice's interim rule, the PATRIOT Act also affects immigrants of all types. A main criticism offered by civil rights groups is that section 412, which amends the INA, allows for the indefinite detention of immigrants and other non-citizens.[274] This section allows detention on the Attorney General's finding of "reasonable grounds to believe" that there is involvement in terrorism or activity exists which poses a danger to national security, and provides for a so-called "limit" on indefinite detention by stating that detention may continue for additional periods of up to six months only if a determination is made that the alien threatens national security or the safety of the community.[275] Civil rights groups are not the only ones concerned, as one writer expressed that "the Patriot Act, approved since the terrorist attacks, allows Attorney General John Ashcroft to detain *indefinitely* foreigners who are certified as endangering national security."[276] Lucas Guttentag, director of the

271. *For Some, Deportation Takes Years*, DESERET NEWS, Dec. 10, 2001, at A2, *available at* 2001 WL 31227652.

272. *Id.* (quoting Chris Nugent of the American Bar Association's Immigration Pro Bono Project).

273. *Id.* (quoting Mohammed Nofal). The Article also quotes public defender Jay Stansell, who represented a client from Afghanistan before September 11 whom the INS claims it can repatriate, as saying, "'It's been less than a year since the *Zadvydas* case, but it seems like we're moving toward more indefinite detention, not less.'" *Id.* (quoting Jay Stansell).

274. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, H.R. 3162, 107th Cong. § 412 (2001). Section 412 states in its entirety, "In general – The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the following . . . ." *Id.*

275. *Id.* Section 236(a)(6) of the Immigration and Nationality Act provides a limit on indefinite detention by stating that an "alien detained solely under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."

276. *For Some, Deportation Takes Years*, DESERET NEWS, Dec. 10, 2001, at A2, *available at* 2001 WL 31227652 (emphasis added) (pointing out that some detainees may be held even though *Zadvydas* would have otherwise limited their detention). The United States has decided to treat the

Immigrants Rights Project for the ACLU, explained that the legislation allows detention based on mere suspicion and that the "detention would be mandatory, and the detention could be indefinite."[277]

Concerns over the changes in immigration law and the increase in detentions of immigrants have led to numerous individuals testifying in Congress. Joseph Greene and Edward McElroy of the INS testified in December of 2001 to present a review of the immigration detention policies.[278] The testimony indicated concern with requiring mandatory detention in statutes like the IIRIRA because it requires the INS to detain a much larger number of people.[279] For example, from the fiscal year 1994 to fiscal year 2001, the average daily detention population more than tripled from 5,532 to 19,533.[280] In the fiscal year 2000, the INS admitted more than 188,000 aliens into detention, and between the fiscal years of 1991 and 2001, the average population of criminal aliens removed by the INS more than doubled from 32,512 to 70,873.[281] The new legislation also prompted Harvard law professor Laurence H. Tribe to testify in December of 2001 that Congress should be involved in the national effort to defeat global terrorism "without inadvertently succumbing to our own reign of terror."[282] Similar to the distinction the Supreme Court pointed out in *Zadvydas* that the choice was "not between imprisonment and the alien 'living at large,'"[283] Professor Tribe pointed out that the choice we face after September 11th is not "liberty versus security."[284] Professor Tribe advised Congress to have the "wisdom

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detainees captured in war as "unlawful combatants" rather than prisoners of war; however, Britain refused to follow the Unites States' lead and treats the detainees as prisoners of war. *See British Forces to Treat Detainees as POWs*, L.A. TIMES, April 30, 2002, at 4. The United States has hundreds of prisoners in indefinite detention who have not been charged, and "some may be tried in military tribunals." *Id.*

277. Interview by CNN with Lucas Guttentag, Director, ACLU Immigrants Rights Project (Oct. 17, 2001), *available at* http://www.cnn.com/2001/COMMUNITY/10/17/guttentag/index.html.

278. *A Review of Department of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 21 (2001) (statement of Joseph Greene, Acting Deputy Executive Associate Commissioner, Field, and Edward McElroy, District Director, INS).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Review of Terrorism Suspect Policies: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of Laurence H. Tribe, Professor of Constitutional Law at Harvard University School of Law).

283. Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

284. *Review of Terrorism Suspect Policies: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of Laurence H. Tribe, Professor of Constitutional Law at Harvard University School of Law).

and courage" to avoid the terrible mistake that the government and the courts made when they ratified and ordered the detention of over 70,000 Japanese-Americans in internment camps during World War II.[285] In *Korematsu v. United States*,[286] the Supreme Court allowed the government to place American citizens in internment camps solely on the grounds of their ancestry, which they justified as preserving national security.[287] Professor Tribe explained to Congress that, "[w]e are at the '*Korematsu*' crossroads. Congress can determine which path we take. And Congress has a special responsibility to act."[288] The resident aliens affected by the *Zadvydas* decision would also be affected by President Bush's Military Tribunal Order of November 13, 2001, as the Professor explained that it is a "direct threat to some 20 million lawful resident aliens in the United States. Almost any act by a resident alien, anywhere, could in some circumstances lead the President to believe the alien has or had some form of involvement with a terrorist organization."[289] Robert A. Levy, a senior fellow in constitutional studies at the Cato Institute, called the Bush military tribunal order "illegitimate."[290] Mr. Levy took offense to the Attorney General's accusation that those who disagreed with the order were "'giving ammunition to America's enemies,' 'aiding terrorists,' or 'eroding our national unity.'"[291] Mr. Levy countered that the opposition to the military tribunal order is "upholding the Constitution; securing the values that sustain a free society; and, at the same time, preserving for the president the option

285. *Id.*

286. 323 U.S. 214 (1944).

287. *Id.*; *see also Review of Terrorism Suspect Policies: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of Laurence H. Tribe, Professor of Constitutional Law at Harvard University School of Law).

288. *Id.* Professor Tribe also testified that the freedoms we enjoy are embodied in the Constitution as are "our security against the fanatics' new tyranny of terror. To assert them here is to win at home the war we are waging so effectively abroad." *Id.* Professor Tribe also did not agree with President Bush's Military Tribunal Order of November 13, 2001, referring to it as having "constitutional infirmities that plague" it, and arguing that avoiding those infirmities would not only protect the rights of those threatened by the Order, but would also protect any consequential convictions from being reversed later on appeal. *Id.* Other congressional testimony provides evidence of serious constitutional concerns regarding President Bush's Military Tribunal Order. *See Review of Terrorism Suspect Policies: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of Timothy Lynch, Director, Project on Criminal Justice, Cato Institute).

289. *Review of Terrorism Suspect Policies: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of Laurence H. Tribe, Professor of Constitutional Law at Harvard University School of Law) (explaining that the resident alien could be unaware that he or she is involved with terrorists because "[a]ll that is required is 'aid[ing] or abet[ing]' terrorists or 'acts in preparation []for' terrorism," thus, hiring a car for an acquaintance who turns out to be a terrorist could make one subject to a military tribunal). Professor Tribe also cited the *Zadvydas* opinion in his testimony to explain that its protection did not extend to aliens outside the United States, so, consequently, there may be no alternative to their indefinite detention by the United States at a "suitable place outside our borders, unless and until their repatriation becomes possible." *Id.*

290. Robert A. Levy, *Not on Our Soil*, NAT'L REV., Jan. 25, 2002, at 4.

291. *Id.* (quoting the Attorney General).

of using military tribunals outside of the United States – where they belong."[292] Further, law professor Margaret H. Taylor of Wake Forest University explained to Congress in her testimony that mandatory detention under INA, or the "lock 'em all up" approach as she calls it, strains the INS' resources and violates due process because it does not allow an immigration judge to make case-by-case determinations based on individual facts.[293] Professor Taylor conveyed to Congress her concerns that "hundreds of post-9/11 detainees from the Middle East, who have been cleared of any possible involvement in terrorism but are nevertheless are [sic] being held for minor visa violations, are the most recent example of individuals who are being detained as part of a symbolic 'crackdown.'"[294] Professor Taylor also supported the view that the PATRIOT Act raises grave constitutional questions.[295] One constitutional scholar summarized the concerns about law during wartime best when he stated, "emergency circumstances sometimes require emergency solutions. Still, the Constitution applies in both peace and war."[296]

One legal writer has stood out among the other critics and endorsed Attorney General Ashcroft's actions. Griffin Bell of the Wall Street Journal not only found the actions lawful, but also asserted that for the Attorney General to have done any less would have been irresponsible.[297] Bell, a former U.S. Attorney General under President Carter, argued that the arrests and detentions assaulted by other legal scholars were not "preventive" at all, but rather were actions taken for independent valid reasons which were authorized by the Constitution and federal law before September 11th.[298] However, Bell conceded that in some facets the detentions were "preventive," as they were used in "unprecedented numbers to thwart further terrorist attacks."[299] Bell recognized that the new provisions of the INA

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292. *Id.*

293. *A Review of Department of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 21 (2001) (statement of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law).

294. *Id.* (noting that we should not deprive people of their liberties in order to send a message).

295. *Id.* (explaining that the interim rule regarding custody procedures issued on September 17, 2001 extends the time for the INS to decide charging and custody matters to forty-eight hours); *see also* Custody Procedures, 66 Fed. Reg. 48,334, 48,335 (Sept. 20, 2001) (to be codified at 8 C.F.R. pt. 287). Also, the PATRIOT Act allows for detention of a certified alien to a maximum of seven days before charges must be filed. *Id.*

296. Robert A. Levy, *Not on Our Soil*, NAT' REV., Jan. 25, 2002, at 2.

297. Griffin Bell, *Ashcroft Is Right to Detain Suspects in Terror Probe*, WALL ST. J., Dec. 17, 2001, at A18.

298. *Id.*

299. *Id.* (noting that the *Zadvydas* decision acknowledged terrorism as a special circumstance

allow for the "indefinite detention of suspected terrorists" pending criminal or removal proceedings, but thought that they fall within the administration's discretion in fighting terrorism.[300] Bell seemed to diverge from the critics in his analysis by placing the emphasis on the need for preventive detention, rather than on the importance of protecting civil liberties even at war. Bell concluded that as long as the detainees "have access to counsel, and are treated *fairly* and with respect, 'preventive detentions' are a *legitimate* part of the administration's efforts to preserve America's freedom from fear."[301] Whether the actions taken by the Attorney General and the Bush Administration are fair or legitimate is a question that the Supreme Court will eventually face.

V. CONCLUSION

For the time being, stateless aliens such as Mohammed Nofal will have to continue to wait. The INS says that it has reviewed Nofal's file and that his past convictions for possessing cocaine and buying marijuana "[make] him a possible community risk and unsuitable for release."[302] While most people would not expect this to inspire or comfort stateless resident aliens like Nofal, a spokeswoman for the INS claims that the Agency has recently released people from Iran, Iraq, Afghanistan, and Jordan after long periods of detention, even after the terrorist attacks.[303] As most of these aliens are placed in remote county jails that the INS contracts with in order to deal with the mandatory detention requirement, Nofal and similarly situated aliens can only hope that the INS is making progress and he will not be left "'in the middle of nowhere . . . lost to the world.'"[304]

As one writer explained the status of immigration law and detained immigrants prior to the *Zadvydas* decision, "[p]rolonged imprisonment is not justice," and the United States Supreme Court has the occasion to "translate liberty and justice into reality for all. It can interpret the law in light of the Constitution and release indefinitely detained aliens, like Kim Ho Ma. This interpretation of individual rights echoes the constitutional refrain that pledges allegiance to the protection of all individuals."[305] While some

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which may allow for preventive detention).

300. *Id.* (noting that even in this area, the actions of the Justice Department are subject to judicial review, and all detainees see a judicial officer after being taken into custody).

301. *Id.* (emphasis added).

302. *For Some, Deportation Takes Years*, DESERET NEWS, Dec. 10, 2001, at A2, *available at* 2001 WL 31227652.

303. *Id.* INS spokeswoman Karen Kraushaar elaborated that people who can prove they are not a threat to public safety and will comply with their conditions of release qualify for release. *Id.*

304. *Id.* (quoting Mary Meg McCarthy, a lawyer at the Midwest Immigrant and Human Rights Center in Chicago).

305. Erika M. Anderson, *A Man Without a Country: When the Inability to Deport Becomes a Life*

Americans may fear that the Court is allowing the release of violent criminals or terrorists with this ruling, that is not the case, as evidenced by the factors to be reviewed before release and by the "special circumstances" exception. As the Ninth Circuit pointed out, about seventy percent of lawful permanent resident aliens affected by this decision are admitted because they have family in the United States.[306] The court pointed out that the members are either citizens or permanent resident aliens.[307] The court also explained that next largest group of permanent resident aliens are "highly educated or exceptionally skilled professionals who can contribute in important ways to the educational institutions and economy of the United States."[308] In fact, the reality is more often the opposite of the common misperception. Most permanent resident aliens are like Hyung Joon Kim who was brought to the United States when he was six years old and became a permanent resident alien when he was eight.[309] Kim committed what the court calls "ordinary crimes" which are the basis for his removal.[310] The Ninth Circuit recognized that most cases are similar to the Kim case, and thus, "[n]o responsible court will leave an 'unprotected spot in the Nation's armor,'" and the Ninth Circuit's decision did not do so.[311]

The Supreme Court's decision in *Zadvydas* appeased many legal writers, many of whom urged in their writings for the Court to follow the lead of the Ninth Circuit by finding that under the statute, the detention of resident aliens could only continue for a reasonable period.[312] However, after the decision, the ball is now back in Congress' court, which leaves many wondering whether one writer's hypothesis will prove true, that indefinite detention was the intent of Congress under the IIRIRA.[313] In the meantime, we can only hope that the tragic consequences of the inaction by Congress to

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Sentence, 24 HAMLINE L. REV. 390, 459 (2001).

306. Kim v. Ziglar, 276 F.3d 523, 528 (9th Cir. 2002), *cert. granted sub nom.* Demore v. Kim, 122 S. Ct. 2696 (2002).

307. *Id.*

308. *Id.*

309. *Id.* at 538.

310. *Id.*

311. *Id.* The court held that a permanent resident alien in removal proceedings has a right to an individualized decision regarding a right to bail based on the particular circumstances of the case. *Id.* at 538-39.

312. Maria V. Morris, *The Exit Fiction: Unconstitutional Indefinite Detention of Deportable Aliens*, 23 HOUS. J. INT'L L. 255, 304 (2001).

313. Kevin Costello, *Without a Country: Indefinite Detention as Constitutional Purgatory*, 3 U. PA. J. CONST. L. 503, 539 (2001) (pointing out the question that remained after the Ninth Circuit's decision: "what if this brand of governmental cruelty is precisely what Congress intended to allow?").

fix the IIRIRA, such as Thanom Pasavtoy, a Laotian alien in INS custody who hung himself in 1999 when he learned that it was unlikely he would ever be released,[314] do not repeat themselves as detainees wait for Congress to respond to the *Zadvydas* decision. Further, legal scholars and constitutional experts can only hope that the testimony Congress has heard since September 11, 2001 will convince Congress to protect the civil rights of all persons in America. Although Americans are nervous after the terrorist attacks and some blame the INS for not tracking the immigrant terrorists in the nation, we must not lose sight of the principles our nation and Constitution are based on, the same principles and laws which afford resident aliens due process rights. As law professor Margaret Taylor said in her testimony before Congress, "it is expensive, and it is inhumane, to assume that detention is the only tool in the INS enforcement arsenal that can be used to 'restore credibility' to the immigration system."[315]

Our nation is capable of using the "special circumstance" exception carved out in *Zadvydas* appropriately in cases such as terrorism, which may call for prolonged or preventive detention for terrorists like Osama Bin Laden. However, the nation must keep in mind the honorable William Fletcher's statement that "our 'Nation's armor' includes our Constitution, the central text of our civic faith. It is the foundation of everything that makes our country's system of laws and freedoms worth defending."[316] The permanent legal residents affected by the *Zadvydas* decision are not terrorists, and we must remember that when we uphold our laws by removing them, we must also uphold our Constitution, the foundation of our nation.

Megan Peitzke[317]

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314. *Id.* at 503.

315. *A Review of Department of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 21 (2001) (statement of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law).

316. *Kim*, 276 F.3d at 538-39.

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