

INDEFINITE DETENTION: TIPPING THE SCALE  
TOWARD THE LIBERTY INTEREST OF FREEDOM AFTER  
*ZADVYDAS V. DAVIS*

*Myrna Pages\**

INTRODUCTION

Could an American ever conceive of being detained in a prison cell indefinitely? Our Nation's Founding Fathers could not fathom such an unscrupulous idea, knowing that this would run afoul of central American values—life, liberty, and property.<sup>1</sup> Arguably, these constitutionally guaranteed interests are at stake not only for Americans but for anyone within the United States' borders. These vital interests were at stake for thousands of illegal aliens who were indefinitely detained, but in *Zadvydas v. Davis*, a 5-to-4 decision, the Supreme Court held that such indefinite detention was unconstitutional.<sup>2</sup>

*Zadvydas* focused on alien deportation proceedings and the Fifth Amendment<sup>3</sup> by consolidating two cases with analogous facts but different outcomes.<sup>4</sup> Specifically, the Supreme Court's ruling

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<sup>1</sup> See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring that "Life, Liberty, and the pursuit of Happiness" are among the "unalienable rights" of every man).

<sup>2</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (holding that "indefinite detention of an alien . . . raise[s] a serious constitutional problem" and violates the Due Process Clause of the Fifth Amendment, except in criminal proceedings with sufficient procedural protections or in special, nonpunitive circumstances—such as "harm-threatening mental illness"—which outweigh an individual's liberty interest).

<sup>3</sup> See *id.* at 684–86.

<sup>4</sup> See *id.* The two cases being consolidated were *Kim Ho Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), and *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999). In *Kim Ho Ma*, the Ninth Circuit affirmed Ma's release because he was held for an unreasonable amount of time after the ninety-day authorized period expired and because there was no repatriation agreement with Cambodia. *Kim Ho Ma*, 208 F.3d at 818–19. In *Zadvydas*, the Fifth Circuit concluded that *Zadvydas*' detention was constitutional because his deportation was not "impossible" since good-faith efforts to deport him were being made and procedures for the periodic review his detention were in place. *Underdown*, 185 F.3d at 294, 297.

involved Kestutis Zadvydas and Kim Ho Ma, who were both ordered to be deported from the United States as a result of various crimes that they had committed.<sup>5</sup> At the time, the Immigration and Naturalization Service [hereinafter INS] had been unsuccessful in finding a country willing to accept the aliens.<sup>6</sup> As a result, both aliens remained in custody past the ninety-day removal period.<sup>7</sup> The aliens each filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241,<sup>8</sup> contesting their continued detention.<sup>9</sup> The District Court for the Eastern District of Louisiana granted Kestutis Zadvydas the writ,<sup>10</sup> but the U. S. Court of Appeals for the Fifth Circuit reversed the decision.<sup>11</sup> Like the district court in Louisiana, the District Court for the Western District of Washington granted Kim Ho Ma's writ.<sup>12</sup> However, unlike the Court of Appeals for the Fifth Circuit, the Ninth Circuit affirmed the District Court's decision.<sup>13</sup> In an attempt to reach a consensus and to address the controversial issue of indefinite detention, the U. S. Supreme Court granted writ of certiorari in both cases.<sup>14</sup>

The purpose of this Note is to analyze how the Court reached the decision in *Zadvydas v. Davis*. Part I discusses the history of the Due Process Clause of the Fifth Amendment in the removal

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<sup>5</sup> *Zadvydas*, 533 U.S. at 684–85. (detailing Zadvydas' long criminal history, as well as noting Ma's conviction of manslaughter at the age of seventeen).

<sup>6</sup> *See id.* at 684, 686 (explaining that Germany, Lithuania, and the Dominican Republic refused to accept Zadvydas based on his lack of citizenship, while Ma's removal to Cambodia was unlikely because the United States does not have a repatriation agreement with that country).

<sup>7</sup> *See id.* at 684–85 (noting that Zadvydas was initially ordered to be deported in 1994, but was not released from INS custody until October, 1997, while the ninety-day removal period expired in Ma's case in "early 1999, but the INS continued to keep [him] in custody").

<sup>8</sup> 28 U.S.C. § 2241; *see also Zadvydas*, 533 U.S. at 684.

<sup>9</sup> *Zadvydas*, 533 U.S. at 684, 686.

<sup>10</sup> *See id.* at 685; *see also Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1027–28 (E.D. La. 1997).

<sup>11</sup> *See Zadvydas*, 533 U.S. at 685; *see also Zadvydas v. Underdown*, 185 F.3d at 294, 297 (accepting that detention of a resident alien is reasonable when release would create a threat to the community or a possibility of flight, so long as the detention is periodically reviewed and efforts to deport are consistently undertaken).

<sup>12</sup> *Zadvydas*, 533 U.S. at 686; *see also Kim Ho Ma v. I.N.S.*, 56 F.Supp.2d 1165, 1166 (WD Wa. 1999) (holding that Ma's petition for a writ of habeas corpus required an evidentiary hearing to determine whether Ma's continued detention by the government violated his substantive due process rights under the Fifth Amendment); *see also Kim Ho Ma*, 208 F.3d at 818 n.2 (applying the established legal framework to Ma's petition and ordering his release).

<sup>13</sup> *See Kim Ho Ma*, 208 F.3d at 818–19, 831 (agreeing with the district court that Ma's detention was unreasonable because his deportation was unlikely to occur in the foreseeable future in the absence of a repatriation agreement with Cambodia).

<sup>14</sup> *Zadvydas*, 533 U.S. at 686; *see also Zadvydas v. Davis*, 531 U.S. 1123 (2001); *Reno v. Kim Ho Ma*, 531 U.S. 924 (2000) (granting writs of certiorari and consolidating the cases for review).

2000]

Indefinite Detention

1215

context.<sup>15</sup> Part II discusses the current state of alien removal and deportation.<sup>16</sup> Part III provides a factual and procedural background leading up to the *Zadvydas* ruling and analyzes the case itself while focusing on the criteria the Court considered in reaching its decision.<sup>17</sup> Part IV examines the legal and social implications following the ruling and the effects of *Zadvydas* after September 11, 2001.<sup>18</sup>

## I. HISTORY OF DUE PROCESS IN DEPORTATION SETTINGS

### A. *Deportation and Constitutional Rights*

Alien residents have attempted to link the U. S. Constitution to deportation proceedings by invoking the Fourth and Sixth Amendments, but these attempts have proven unsuccessful.<sup>19</sup> *Yamataya v. Fisher* has been labeled as the landmark case that began the successful linking of the Constitution to deportation proceedings through invocation of the Fifth Amendment.<sup>20</sup> Kaoru Yamataya was a Japanese immigrant who came to the United States in 1901.<sup>21</sup> As an immigrant during this time period, Yamataya was considered deportable because “she was a pauper and a person likely to become a public charge.”<sup>22</sup> Yamataya contested the deportation proceedings initiated against her, claiming that they were unjust.<sup>23</sup> The Court relied on the principle

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<sup>15</sup> See *infra* notes 19–37 and accompanying text.

<sup>16</sup> See *infra* notes 38–59 and accompanying text.

<sup>17</sup> See *infra* notes 60–139 and accompanying text.

<sup>18</sup> See *infra* notes 140–210 and accompanying text.

<sup>19</sup> THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 793 (4th ed. 1998) (noting that courts have consistently held that the Sixth Amendment’s protection of criminal defendants does not apply to deportation proceedings that qualify as civil proceedings, nor does the exclusionary rule of the Fourth Amendment apply to deportation proceedings).

<sup>20</sup> See *id.* at 793; *The Japanese Immigrant Case*, 189 U.S. 86 (1903) [hereinafter *Yamataya v. Fisher*].

<sup>21</sup> *Yamataya*, 189 U.S. at 87.

<sup>22</sup> See *id.* at 87, 94 (noting that the law, during that time, made it lawful to exclude certain classes of aliens from the United States). The law included:

[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage [was] paid for with the money of another or who [was] assisted by others to come . . . (citations omitted)

Act of Mar. 3, 1891, Ch. 551, 26 Stat. 1084, 1084 (1891).

<sup>23</sup> See *Yamataya*, 189 U.S. at 101–02 (arguing that the Act of 1891 gave overly broad discretion to executive and administrative officers, and therefore, the investigation was unfair

that Congress has the power to establish regulations governing aliens without judicial review.<sup>24</sup> The Court, however, drew a distinction between an alien seeking admission into the United States and an alien already in the United States.<sup>25</sup> The Court indicated that the failure to afford an alien resident notice or a fair chance to be heard prior to deportation, constituted a violation of the Due Process Clause of the Fifth Amendment.<sup>26</sup> The Court went on to say:

[I]t is not competent for the Secretary of the Treasury . . . at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.<sup>27</sup>

The Court established that such arbitrary power was inconsistent with the well recognized principle of due process of law.<sup>28</sup> In this case, the Court ultimately held that *Yamataya* had been afforded due process of law because she was given the opportunity to be heard.<sup>29</sup>

Indeed, *Yamataya* is not the only case that has addressed the Due Process Clause of the Fifth Amendment in the context of alien immigration proceedings. Other U. S. Supreme Court cases have upheld the proposition that due process extends to aliens.<sup>30</sup>

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to appellant since she was not afforded proper due process). *Yamataya* claimed that she was unaware of the nature of the proceedings initiated against her because she did not comprehend or speak the English language. *See id.* at 101.

<sup>24</sup> *See id.* at 97 (noting that principles are derived from several cases that indicate that Congress may exclude aliens of any race, set up conditions to enter the U.S., establish regulations to remove aliens who arrive in "violation of law," and delegate such authority to executive officers, without judicial intervention).

<sup>25</sup> *See id.* at 98-99.

<sup>26</sup> *Id.* at 101. The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

<sup>27</sup> *Yamataya*, 189 U.S. at 101.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 101-02 (finding that *Yamataya* had notice, while informal, of an investigation to determine the legality of her presence in the U.S., that she answered questions posed by the immigration inspector, and that circumstances could have been brought up on appeal to the Secretary of the Treasury, who could have ordered further investigation, but those circumstances were not raised).

<sup>30</sup> *See, e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (stating that since a hearing is required before a tribunal, the deportation hearing must include considerations of liberty, happiness, and, given upheavals that may exist in the land where the aliens could be

2000]

Indefinite Detention

1217

*B. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA] was signed into law as an effort to correct enforcement and efficiency problems involving deportation proceedings, which were prevalent under existing Immigration Law.<sup>31</sup> The purpose of the law was to expedite the process of illegal alien identification and subsequent removal.<sup>32</sup> The legislation involves “an interrelated statutory structure designed to streamline the removal process and expeditiously remove criminal aliens from this country.”<sup>33</sup> The IIRIRA’s removal provisions took effect on April 1, 1997<sup>34</sup> and shortened the removal period from six months to ninety days.<sup>35</sup> The IIRIRA “mandates detention of certain criminal aliens during the removal proceedings and for the subsequent [ninety-]day removal period”<sup>36</sup> and more importantly, implements the “post-removal-period provision” at issue in *Zadvydas*.<sup>37</sup>

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returned, life itself); *Russian Volunteer Fleet v. U. S.*, 282 U.S. 481, 489, 491–92 (1931) (recognizing that “alien friend[s]” in the U. S. are entitled to Fifth Amendment protections even when their native countries do not extend such protections to U.S. citizens); *Wong Wing v. U. S.*, 163 U.S. 228, 237 (1896) (providing detained aliens with due process of law because if unlawful residence were considered an infamous crime, then it would be impermissible to allow legislation to affect such residence unless the issue of guilt had already been decided in a judicial trial). The express terms of the Due Process Clause provide courts with justification to distinguish aliens within the United States from aliens seeking admission to the United States, and to afford due process rights to the former but not to the latter. As the Court in an earlier case persuasively stated:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: “Nor shall any State deprive *any person* of life, liberty, or property without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.” These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . .

*Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added). Thus, while the Due Process Clause of the Fifth Amendment appears to permit a distinction between those who are aliens and those who are not, the Fourteenth Amendment Due Process Clause does not.

<sup>31</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA]; *Kwon v. Comfort*, 174 F.Supp.2d 1141, 1143 (D.Colo. 2001).

<sup>32</sup> See *Kwon*, 174 F.Supp.2d at 1143 (recognizing Congress’s desire to strengthen the immigration laws and close any gaps to which the laws may have been susceptible); see also 142 CONG. REC. 24,783 (1996).

<sup>33</sup> See *Kwon*, 174 F.Supp.2d at 1143.

<sup>34</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967–69 (Nov. 14, 2001) (to be codified at 8 C.F.R. pt. 241).

<sup>35</sup> *Zadvydas*, 533 U.S. at 698; IIRIRA § 305 (codified at 8 U.S.C. § 1231 (2000)).

<sup>36</sup> *Zadvydas*, 533 U.S. at 698; IIRIRA § 305 (codified at 8 U.S.C. § 1231 (2000)).

<sup>37</sup> *Zadvydas*, 533 U.S. at 698; IIRIRA § 305 (codified at 8 U.S.C. § 1231 (2000)).

## II. ALIEN REMOVAL AND DEPORTATION

### A. *Circumstances Warranting Removal*

The first class of aliens that are deportable includes those deemed inadmissible by law at the time they entered the United States, those who become inadmissible upon adjustment of their alien status, or those who violate their alien status.<sup>38</sup> An alien that falls within one of these circumstances may avoid deportation if he or she qualifies for a waiver.<sup>39</sup> For example, if the alien is inadmissible because he or she “knowingly . . . encouraged, induced, assisted, abetted, or aided” in smuggling, that alien may nevertheless qualify for a waiver.<sup>40</sup> Also, an alien who is involved in “certain misrepresentations” may circumvent removal proceedings by obtaining a waiver.<sup>41</sup> However, obtaining this waiver is conditioned upon meeting certain requirements, such as having an immediate relative that is a United States citizen and having an immigrant visa.<sup>42</sup>

The second class of deportable aliens includes those who have been convicted of criminal offenses,<sup>43</sup> including general crimes<sup>44</sup>—crimes involving moral turpitude,<sup>45</sup> aggravated felonies,<sup>46</sup> or participating in “high speed flight from an immigration checkpoint.”<sup>47</sup> The criminal offense class also includes the violation

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<sup>38</sup> 8 U.S.C. § 1227(a)(1) (2000). The statute lists six circumstances within this first class that would render an alien deportable. They include aliens who are inadmissible, aliens presently in violation of the law, aliens who have violated their nonimmigrant status or their original condition of entry, aliens who have had their conditional permanent residence terminated, any alien involved in smuggling, and aliens engaged in marriage fraud. See § 1227(a)(1)(A)–(G) (noting that section (F), concerning omnibus appropriations for the fiscal year ending September 30, 1997, was repealed by the Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-723 (1996)).

<sup>39</sup> See § 1227(a)(1)(E)(iii), (H) (specifying that waivers may be granted under the “smuggling” and “misrepresentation” categories at the discretion of the United States Attorney General).

<sup>40</sup> See § 1227(a)(E)(i), (iii) (permitting waivers “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest”).

<sup>41</sup> See § 1227(a)(1)(H), 1182(a)(6)(C) (generalizing certain misrepresentations to include “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure . . . a visa, other documentation, or admission into the United States”).

<sup>42</sup> See § 1227(a)(1)(H).

<sup>43</sup> § 1227(a)(2).

<sup>44</sup> § 1227(a)(2)(A).

<sup>45</sup> § 1227(a)(2)(A)(i), (ii).

<sup>46</sup> § 1227(a)(2)(A)(iii).

<sup>47</sup> § 1227(a)(2)(A)(iv).

2000]

Indefinite Detention

1219

of laws regarding “controlled substances.”<sup>48</sup> An alien may also be deported if he or she is involved in stalking, domestic violence, or violence against children.<sup>49</sup> Furthermore, an alien may be deported if he or she fails to register and falsifies documents,<sup>50</sup> unlawfully votes,<sup>51</sup> or for security and other related reasons.<sup>52</sup>

### *B. Alien Removal and Deportation Procedure*

Once an alien is deemed deportable under § 1227, the removal process begins with what is known as a “notice to appear.”<sup>53</sup> Notice of appearance informs the alien about the nature of and the reasons for the proceedings.<sup>54</sup> If the alien fails to appear after being properly served with notice, he or she may face possible sanctions, including being removed in absentia.<sup>55</sup> Consequently, the alien will not be eligible for discretionary relief for ten years.<sup>56</sup>

Pursuant to 8 U.S.C. § 1231(a), the United States Attorney General has the authority “to detain aliens who are subject to final orders of removal, in order to effectuate their removal from the United States.”<sup>57</sup> A detained alien must be removed from the United States within a ninety-day removal period.<sup>58</sup> Once the ninety-day removal period expires, the United States Attorney General has the power to continue detaining inadmissible aliens, deportable aliens, and “[a]ny alien [whom] the Attorney General determines is a danger to the community or is unlikely to comply

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<sup>48</sup> See §1227(a)(2)(B) (declaring aliens deportable who are convicted of violating drug laws or who are drug abusers or addicts).

<sup>49</sup> § 1227(a)(2)(E)(i).

<sup>50</sup> § 1227(a)(3).

<sup>51</sup> § 1227(a)(6).

<sup>52</sup> See § 1227(a)(4).

<sup>53</sup> 8 U.S.C. § 1229(a)(1) (2000).

<sup>54</sup> § 1229(a)(1)(A), (D); see ALEINIKOFF ET AL., *supra* note 19, at 827. The notice to appear also provides the alien with the time and place that the hearing will occur before an immigration judge. § 1229(a)(1)(G)(i), § 1229a(a)(1); see ALEINIKOFF ET AL., *supra* note 19, at 827.

<sup>55</sup> § 1229a(b)(5).

<sup>56</sup> See § 1229a(b)(7) (explaining that any alien against whom a final order of removal is entered in absentia shall not be eligible for relief for ten years).

<sup>57</sup> 8 U.S.C. § 1231(a) (2000); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001) (codified at 8 C.F.R. pts. 3 and 241).

<sup>58</sup> See Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,967 (discussing that the ninety-day removal period begins “on the date the removal order becomes administratively final, the date that the [INS] is able to execute the removal order after completion of any judicial review . . . , or the date the alien is released from criminal incarceration, whichever is later”); see also 8 C.F.R. 241(a)(1); 8 U.S.C. § 1231(a) (2000).

with the removal order.”<sup>59</sup>

### III. BACKGROUND

#### A. *The Story of Kestutis Zadvydas*

Kestutis Zadvydas was born in Germany.<sup>60</sup> Zadvydas was eight-years old when he and his family immigrated to the United States.<sup>61</sup> His family obtained admission to the U.S. with the help of a relocation program designed to assist displaced individuals.<sup>62</sup> Once in the U.S., Zadvydas began to acquire a criminal record.<sup>63</sup> Deportation proceedings were first initiated in 1977 based on two past convictions, but Zadvydas was released while the process was pending and he disappeared for ten years.<sup>64</sup> In 1987, Zadvydas was arrested for possession of cocaine with intent to distribute, but again fled the jurisdiction while out on bail.<sup>65</sup> He eventually turned himself in and was convicted on the drug charge in 1992 and served two years before being released on parole.<sup>66</sup> In 1994, INS officials took him into custody and an immigration judge ordered that he be held without bond pending the deportation process because of his history of flight from authorities.<sup>67</sup> In 1995, Zadvydas filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.<sup>68</sup> Zadvydas claimed that his continued detention past the removal

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<sup>59</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,967.

<sup>60</sup> *Zadvydas v. Davis*, 533 U.S. 678, 684 (2001).

<sup>61</sup> *Id.*

<sup>62</sup> *Zadvydas v. Caplinger*, 986 F.Supp. 1011, 1014 (E.D. La. 1997).

<sup>63</sup> *See Zadvydas v. Underdown*, 185 F.3d 279, 283 (5th Cir. 1999). In 1966, when he was eighteen, Zadvydas was convicted of third degree attempted robbery. *Id.*; *see also Zadvydas*, 533 U.S. at 684; *Caplinger*, 986 F.Supp. at 1014. In 1974, at the age of twenty-five, he was convicted of third degree attempted burglary. *Underdown*, 185 F.3d at 283.

<sup>64</sup> *Underdown*, 185 F.3d at 283.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* In 1994, the INS ordered Zadvydas to be deported to Germany. Germany, however, declined to accept him because he was not considered to be a German citizen. The INS also requested that Lithuania accept Zadvydas, but because he had insufficient documentation demonstrating that he was either a citizen or a permanent resident, his admission was rejected. Finally, the INS asked the Dominican Republic to accept Zadvydas but it too denied him. *Id.* at 283–84.

<sup>68</sup> *Zadvydas*, 533 U.S. at 684. 28 U.S.C. § 2241(c) provides that a writ of habeas corpus may be granted to a prisoner when “[h]e is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States.”

2000]

Indefinite Detention

1221

period was unconstitutional.<sup>69</sup> The District Court for the Eastern District of Louisiana granted the writ of habeas corpus based on its finding that the detention violated Zadvydas's substantive due process rights.<sup>70</sup> The United States Court of Appeals for the Fifth Circuit reversed the lower court's judgment.<sup>71</sup> The court drew no distinction between an excludable alien and a deportable alien.<sup>72</sup> Thus, the court held that continued detention was lawful based on the plenary power doctrine.<sup>73</sup>

### *B. The Story of Kim Ho Ma*

Kim Ho Ma was seven-years old when he entered the United States as a Cambodian refugee.<sup>74</sup> He eventually obtained legal permanent resident status.<sup>75</sup> Like Zadvydas, Kim Ho Ma acquired a criminal record and by the age of seventeen, he was convicted of first degree manslaughter.<sup>76</sup>

After being detained past the removal period, Ma filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.<sup>77</sup> He claimed that the prolonged detention infringed upon his

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<sup>69</sup> See *Caplinger*, 986 F.Supp. at 1015. Zadvydas alleged "1) that he never made a knowing waiver of his constitutional rights, including his right to counsel; 2) that his detention violate[d] international law; 3) that his detention violate[d] due process; 4) that his detention [was] in effect one for life and thus violate[d] the Eighth Amendment's prohibition against cruel and unusual punishment." *Id.*

<sup>70</sup> See *id.* at 1026-27 (noting that of serious concern is the duration of petitioner's detention thus far, and its indefinite termination). The singular purpose of detention is the ultimate deportation, and therefore, if deportation is not possible, detention no longer serves its purpose. *Id.* Detention becomes permanent if there is no place to which the detainee may be deported. *Id.*

<sup>71</sup> See *Zadvydas v. Underdown*, 185 F.3d at 283, 291 (reasoning that although slight, there remained a chance that a country would eventually accept him). The court of appeals concluded that so long as "good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place," the alien may be detained if he is a danger to the community or if there is risk of flight. *Id.* at 297.

<sup>72</sup> *Id.* at 297.

<sup>73</sup> See *id.* at 294 (holding that Zadvydas' detention was permissible under the Government's plenary immigration power and therefore not violative of substantive due process). Plenary immigration power refers to the broad power the federal government has to regulate immigration. See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990).

<sup>74</sup> See *Zadvydas*, 533 U.S. at 685.

<sup>75</sup> See *id.*; see also *Kim Ho Ma v. Reno*, 208 F.3d at 818. Kestutis Zadvydas also had a green card. *Zadvydas v. Caplinger*, 986 F.Supp. at 1014.

<sup>76</sup> See *Zadvydas*, 533 U.S. at 685 (noting that Ma participated in gang-related criminal activity including gang-related shooting, for which Ma was convicted, and sentencing Ma to 38 months' imprisonment for committing an aggravated felony).

<sup>77</sup> See *id.* at 686.

constitutional rights.<sup>78</sup> The District Court for the Western District of Washington granted the writ reasoning that “post-removal-period detention” was unconstitutional.<sup>79</sup> The Court of Appeals for the Ninth Circuit affirmed the district court’s judgment.<sup>80</sup>

### C. *Zadvydas v. Davis*

The Court in *Zadvydas* held that 8 U.S.C. § 1231(a)(6) did not allow indefinite detention of aliens because “the statute, read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States.”<sup>81</sup> The Court began its analysis by listing the classes of aliens that are subject to removal.<sup>82</sup> The Court also noted that under 8 U.S.C. § 1231(a)(6), “an alien who falls into one of these categories ‘may be detained beyond the [ninety-day] removal period.’”<sup>83</sup> The interpretation of this phrase was the crux of the case, whereby the government argued that section 1231(a)(6) set no time limit regarding the post-removal-period when read literally.<sup>84</sup> Thus, the main issue in the case was “whether this post-removal-period statute authorize[d] the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien’s removal.”<sup>85</sup> The issue was not whether an alien should be afforded the protection of the Fifth Amendment because the Due Process

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<sup>78</sup> See *Phan v. Reno*, 56 F. Supp. 2d 1149, 1151 (W.D. Wash. 1999) (stating that due process, generally referring to procedural requirements of notice and hearing, also includes substantive rights, many of which were incorporated from the Bill of Rights).

<sup>79</sup> *Zadvydas*, 533 U.S. at 686; *Phan*, 56 F.Supp.2d at 1158.

<sup>80</sup> See *Zadvydas*, 533 U.S. at 686; *Kim Ho Ma*, 208 F.3d at 818 (opining that Ma could not be detained for more than the ninety-day period allowed by statute). The District Court found that Ma’s release was predicated upon substantive due process rights, yet, while affirming that decision, the Ninth Circuit held that the INS lacked authority to detain Ma. *Id.*

<sup>81</sup> See *Zadvydas*, 533 U.S. at 689. Justice Breyer delivered the opinion of the Court in which Justices Stevens, O’Connor, Souter, and Ginsburg joined while Justices Scalia, Thomas, Kennedy, and Chief Justice Rehnquist dissented—resulting in a five to four majority ruling). See *id.* at 681.

<sup>82</sup> See *id.* at 688 (identifying as members of that class aliens who commit unlawful crimes, who pose a threat to the community, or who are more than likely not going to adhere to removal orders).

<sup>83</sup> See *id.* at 688–89 (noting that an alien, to whom a removal order has been directed, who is inadmissible, removable, poses a risk to the community as determined by the United States Attorney General, or who will likely not comply with the removal order, may be detained beyond the normal period for removal and may be subject to supervision if released) (citations omitted); see also 8 U.S.C. § 1231(a)(6) (2000).

<sup>84</sup> See *Zadvydas*, 533 U.S. at 689 (construing the statute such that indefinite detention is permissible).

<sup>85</sup> *Id.* at 682 (emphasis in the original).

2000]

Indefinite Detention

1223

Clause applies to “any ‘person.’”<sup>86</sup> As with the cases discussed and cited earlier, the Court here affirmed the lower courts’ extension of this fundamental right to aliens.<sup>87</sup> The Court noted that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment’s Due Process] Clause protects.”<sup>88</sup>

Moving beyond the due process arena, the government relied on four other arguments to justify the detention of an alien indefinitely. The government asserted that the statute in question served a legitimate government interest,<sup>89</sup> that aliens may be indefinitely detained since they are just *aliens* and not citizens,<sup>90</sup> that the government has plenary power over these matters,<sup>91</sup> and that aliens do not have a liberty interest that warrants protection.<sup>92</sup> As to the first contention, the government asserted that the statute has a regulatory function, namely to ensure that aliens do not abscond immigration proceedings initiated against them and to protect the community from danger.<sup>93</sup> In addressing this claim, the Court first noted that guaranteeing an alien’s presence at future deportation proceedings was a feeble justification for the alien’s detention when the alien’s removal was nothing more than a “remote possibility at best.”<sup>94</sup> Therefore, the Court concluded that “where 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.’”<sup>95</sup> The Court also reasoned that

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<sup>86</sup> See *id.* at 690 (reading the Due Process Clause literally).

<sup>87</sup> See *id.*; see also, *Zadvydas v. Caplinger*, 986 F.Supp. 1011, 1020 (E.D. La. 1997); *Zadvydas v. Underdown*, 185 F.3d 279, 289 (5th Cir. 1999). For a discussion of the application of the Fifth Amendment to alien removal, see ALIENIKOFF, *supra* note 19, at 793.

<sup>88</sup> *Zadvydas*, 533 U.S. at 690. The Court lists some circumstances that warrant government detention such as when the detention is pursuant to “a *criminal* proceeding with adequate procedural protections” or when it is in the individual’s best interest. The Court explains that “where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint[,]’ government detention is warranted. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

<sup>89</sup> *Zadvydas*, 533 U.S. at 688–91 (referring to 8 U.S.C. § 1231(a)(6)). The government argued that preventing flight and protecting the community were the interests underlying this statutory interpretation. See *id.* at 690.

<sup>90</sup> See *id.* at 692 (arguing “alien status itself can justify indefinite detention”).

<sup>91</sup> *Id.* at 695.

<sup>92</sup> See *id.* at 696 (referring to the government’s argument that aliens possess a reduced liberty interest because of their legal status in this country).

<sup>93</sup> *Id.* at 690.

<sup>94</sup> See *id.* at 690. The Court noted that the INS had made various attempts with respect to both aliens to find a country willing to accept them but was unsuccessful. *Id.* at 684, 686.

<sup>95</sup> See *id.* at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

the goal of protecting the community is subject to limitations especially when indefinite detention is at issue.<sup>96</sup> The Court then addressed the government's second argument—that it was permissible to detain an alien indefinitely based solely on his or her alien status.<sup>97</sup> Once again, this claim invoked the Due Process Clause.<sup>98</sup> The Court drew a distinction between aliens seeking admission to the United States and aliens already within its borders.<sup>99</sup> “[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause [of the Fifth Amendment] applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>100</sup> On the other hand, precedent dictates that aliens within the United States’ borders should be afforded greater constitutional protections than aliens who have not entered the country.<sup>101</sup> Third, the government argued that Congress had plenary power over immigration matters.<sup>102</sup> The Court did not deny that Congress had authority governing alien detention and removal.<sup>103</sup> However, the Court expressed concern over the possibility that the government would be unable to affect an alien's removal in some circumstances, thus possibly subjecting the alien to indefinite detention.<sup>104</sup> Such a result would not be constitutionally permissible.<sup>105</sup> Finally, the government argued that aliens do not

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<sup>96</sup> See *id.* at 690–91 (discussing that potentially indefinite detention is permitted if an individual is deemed to be very dangerous and there exist “other special circumstance[s], such as mental illness, that help[] to create the danger”). However, even in this situation, the Court determined that such individuals need to be afforded “strong procedural protections.” *Id.* at 691.

<sup>97</sup> *Id.* at 692.

<sup>98</sup> See *id.* at 693–94.

<sup>99</sup> See *id.* at 692–93 (contrasting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953), with the present case). The Court distinguished *Mezei* because *Mezei* involved an alien, who, after a significant absence from the country, attempted to re-enter but was detained indefinitely. In *Mezei*, the alien was treated “as if stopped at the border,” and his detention was therefore held to be constitutional. See *id.* at 692–93.

<sup>100</sup> *Zadvydas*, 533 U.S. at 693.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 695 (discussing the Government's argument that decisionmaking in the immigration arena remains under the province of the Executive and Legislative branches, to which the judiciary must defer).

<sup>103</sup> See *id.* (discussing that in this instance, 8 U.S.C. § 1231(a)(3) expressly grants authority to the Attorney General).

<sup>104</sup> See *id.* (clarifying that the issue before the court was whether the government has the right to indefinitely detain those aliens whose removal from the United States is improbable or impossible).

<sup>105</sup> See *id.* (stressing that even Congress's plenary power is “subject to important constitutional limitations”).

2000]

Indefinite Detention

1225

possess a fully protected liberty interest.<sup>106</sup> The Court's reasoning hinted that everyone, whether an alien or not, has a liberty interest—especially when there is a possibility of being detained indefinitely.<sup>107</sup>

#### *D. Statutory Interpretation*

In determining that Congress did not intend to permit indefinite confinement, the Court relied on three factors: the express terms of the statute, comparisons with other laws involving alien detention, and the legislative history.<sup>108</sup> The Court also maintained its focus on the underlying issue—the potential for indefinite detention.<sup>109</sup> The Court found no “clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.”<sup>110</sup> At the same time, the Court concluded that whether the purpose of the statute was to prevent alien flight or to protect the community, indefinitely detaining a person would not be in accordance with constitutional principles.<sup>111</sup> Absent clear congressional intent, therefore, the court chose to avoid the serious constitutional problem that indefinite detention posed.

The Court pointed out that the words of the statute did not grant the United States Attorney General unlimited discretion to indefinitely detain an alien.<sup>112</sup> The statute in effect at the time provided that the government *may* continue to detain an alien who still remains in the United States or release that alien under supervision.<sup>113</sup> The government claimed that the word “may” should

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<sup>106</sup> *Id.* at 696 (claiming that an alien does not enjoy the legal right to ‘live at large’ in the United States). The liberty in question is the liberty afforded under the Due Process Clause which “includes protection against unlawful or arbitrary personal restraint or detention.” *See id.* at 718 (Kennedy, J., dissenting). The government’s argument stressed that an alien’s liberty interest, while not extinct, is limited solely because the alien is not a full citizen. *Id.* at 696.

<sup>107</sup> *See id.* (acknowledging that an alien has a liberty interest sufficient to warrant Constitutional protection).

<sup>108</sup> *See id.* at 697.

<sup>109</sup> *See id.* at 699 (concluding that absent clear congressional intent the court would avoid the serious constitutional problem indefinite detention would pose).

<sup>110</sup> *Id.* at 697.

<sup>111</sup> *See id.* (suggesting that the Court believes that the goals of preventing aliens from fleeing future immigration proceedings and of protecting the community are merely secondary purposes of the statute). This is so because the main purpose of the statute was actually to “effectuat[e] an alien’s removal.” *See id.* (returning to the notion that the statute was enacted to streamline the removal process and expeditiously remove criminal aliens from this country); *see also supra* notes 15, 32.

<sup>112</sup> *Zadvydas*, 533 U.S. at 697.

<sup>113</sup> *See* 8 U.S.C. § 1231(a)(6); *Zadvydas*, 533 U.S. at 697 (analyzing the word “may”).

be read in a manner that would grant the United States Attorney General unlimited discretion.<sup>114</sup> The Court agreed that the term “may” provides some discretion.<sup>115</sup> Yet the Court concluded, such a term is ambiguous and “if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms.”<sup>116</sup>

An important distinction between the IIRIRA and other similar statutes is that IIRIRA is broad in its application. Because the IIRIRA “applies not only to . . . criminals, but also to ordinary visa violators,” what is permitted under other statutes is not necessarily permitted under the IIRIRA.<sup>117</sup> In essence, aliens with expired visas would have to deal with the possibility of indefinite detention if there is no country willing to accept their return.

Finally, the Court examined the history of immigration law in the United States.<sup>118</sup> The Court found that prior to 1952, detention was simply required to end within a “reasonable time.”<sup>119</sup> Later, the notion of “reasonable time” was clarified so as to allow detention for a maximum of six months.<sup>120</sup> For certain classes of aliens such as aggravated felons, this six-month period was eventually mandated.<sup>121</sup> In 1996, however, the removal period was reduced from six months to three months while still mandating the “detention of certain criminal aliens during the removal proceedings and for the subsequent ninety-day removal period.”<sup>122</sup> Thus, trying

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<sup>114</sup> See *Zadvydas*, 533 U.S. at 697.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* (noting that “while ‘may’ suggests discretion, it does not necessarily suggest unlimited discretion”).

<sup>117</sup> See *id.* (noting that other statutes involving alien removal—such as those governing criminal aliens only—are narrowly applied).

<sup>118</sup> *Id.* at 697–98.

<sup>119</sup> See *id.* (noting that this was the interpretation courts gave to pre-1952 immigration statutes which did not address how long an alien could be detained for); see also Immigrant Act of 1917, ch. 29 §§ 19, 20; Pub. L. No. 64-301, 39 Stat. 874, 889–90 (1917) (*construed in Spector v. Landon*, 209 F.2d 481, 482 (1954) (noting that “the right to hold an alien in custody under a deportation warrant persists for no more than a reasonable period”).

<sup>120</sup> *Zadvydas*, 533 U.S. at 698 (covering four decades of immigration proceedings beginning in the early 1950s); See, Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 210 (1952).

<sup>121</sup> *Zadvydas*, 533 U.S. at 698. See The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§7343-44, 102 Stat. 4181, 4470–71 (1988); The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, §306, 105 Stat. 1733, 1751 (1991); and The Immigration Act of 1990, Pub. L. No. 101-649, §504, 104 Stat. 4978, 5050 (1990) (highlighting that all these provisions provide enlarged powers to detain aliens when they pose a threat to the community).

<sup>122</sup> *Zadvydas*, 533 U.S. at 698. (citing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) (citations omitted).

to define “reasonable time” has been an issue for Congress spanning five decades. Even so, there was neither expressly stated nor implied Congressional intent in the legislative history that would “authorize indefinite, perhaps permanent, detention.”<sup>123</sup> The Court concluded, “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”<sup>124</sup> The Court vacated the judgments of both the Fifth and Ninth Circuit Courts of Appeals because they did not conform to the Supreme Court’s reading of post-removal-period detention.<sup>125</sup>

In his dissent, Justice Scalia—joined by Justice Thomas—stated that the statute clearly gave the United States Attorney General the power to detain criminal aliens indefinitely.<sup>126</sup> Justice Scalia claimed to have given the statute its plain and ordinary meaning and implied that the majority should have done the same.<sup>127</sup>

In part one of his dissenting opinion, Justice Kennedy analyzed the majority’s interpretation of the statute.<sup>128</sup> Justice Kennedy argued that, as Justice Scalia noted, the statute gave the Attorney General the authority to detain an alien, who had been ordered removed, past the post-removal period.<sup>129</sup> According to Justice Kennedy, the majority improperly invoked the canon of constitutional doubt when interpreting the statute.<sup>130</sup> Although Justice Kennedy conceded “that a substantial constitutional question is presented by the prospect of lengthy, even unending, detention,” he still adamantly claimed that the majority’s

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<sup>123</sup> *Id.* at 699.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 702 (discussing that the Fifth Circuit was imposing an overly burdensome standard for detained aliens to meet while the Ninth Circuit was solely relying on the lack of “repatriation agreement[s] without giving due weight to the likelihood of successful future negotiations”); *vacating, Kim Ho Ma v. Reno*, 208 F.3d 815, 831 (9th Cir. 2000); *Zadyvdas v. Underdown*, 185 F.3d 279, 294, 297 (5th Cir. 1999).

<sup>126</sup> *See Zadyvdas*, 533 U.S. at 702 (Scalia, J., dissenting); *see also id.* at 704–05 (Scalia, J., dissenting) (concluding that there is no valid reason why an alien who is subject to a final order of removal should have “any greater due process right to be released into the country than an alien at the border seeking entry” and therefore, finding no impediment to giving the statute its plain meaning).

<sup>127</sup> *See id.* at 705 (Scalia, J., dissenting). Justice Scalia also argued that criminal aliens do not have a constitutional right to be free in this country. *See id.* at 702–03 (Scalia, J., dissenting) (viewing the criminal alien’s claim for supervised release into the United States as a claimed right of release which is not constitutionally supported).

<sup>128</sup> *See id.* at 706–18 (Kennedy, J., dissenting, Rehnquist, C. J., joining, Scalia, J., and Thomas, J., joining in Part I).

<sup>129</sup> *Id.* at 706 (Kennedy, J., dissenting).

<sup>130</sup> *See id.* at 707 (Kennedy, J., dissenting) (explaining that the canon of constitutional doubt provides that when “a court . . . find[s] two interpretations of equal plausibility, it should choose the construction that avoids confronting a constitutional question”).

interpretation of the statute “contradicts and defeats the purpose set forth in the express terms of the statutory text.”<sup>131</sup> He asserted that the purpose of detaining an alien beyond ninety days is to ensure public safety rather than to effectuate removal.<sup>132</sup> Justice Kennedy concluded part one of his dissent by stating “that a removable alien does not have the same liberty interest as a citizen does.”<sup>133</sup>

The liberty interest of such aliens is the subject of part two of Justice Kennedy’s dissent.<sup>134</sup> Justice Kennedy noted that once an alien has been ordered removed, he or she does not have the right to remain in this country.<sup>135</sup> However, he stated that “both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious.”<sup>136</sup> He explained that when the removal process requires detention, the detention cannot be intended to serve as punishment.<sup>137</sup> Arguably, when there is no country willing to accept an alien, his or her detention could become arbitrary and capricious because it may be years before the alien can be successfully removed. Yet, according to Justice Kennedy, this is not so because detention in these cases ensures that an alien does not go free and helps to protect the public.<sup>138</sup> Justice Kennedy concluded by claiming that the majority violated the separation of powers by overstepping their proper judicial function.<sup>139</sup>

#### IV. THE LEGAL IMPLICATIONS OF *ZADVYDAS*

*Zadvydas* caused a dramatic reformation in the existing immigration law regarding detained aliens.<sup>140</sup> Changing the law

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<sup>131</sup> *Id.* at 706–07 (Kennedy, J., dissenting).

<sup>132</sup> *Id.* at 708 (Kennedy, J., dissenting).

<sup>133</sup> *Id.* at 717 (Kennedy, J., dissenting).

<sup>134</sup> *See id.* at 718–25, 718 (Kennedy, J., dissenting and Rehnquist, C. J., joining).

<sup>135</sup> *See id.* at 720 (Kennedy, J., dissenting) (reasoning that the aliens’ connection to the community is insufficient to allow those who have not complied with the laws of the United States to remain in the country).

<sup>136</sup> *Id.* at 721 (Kennedy, J., dissenting).

<sup>137</sup> *Id.* (Kennedy, J., dissenting).

<sup>138</sup> *Id.* (Kennedy, J., dissenting).

<sup>139</sup> *See id.* at 725 (Kennedy, J., dissenting and Rehnquist, C. J., joining) (stating that “[t]he majority instead would have the Judiciary review the status of repatriation negotiations, which, one would have thought, are the paradigmatic examples of nonjusticiable inquiry”). “[T]he Court’s ruling causes systemic dislocation in the balance of powers.” *Id.* at 705 (Kennedy, J., dissenting).

<sup>140</sup> *See*, Rob Reckers, Note, *The Future of Aliens Ordered Removed from the United States in the Wake of Zadvydas v. Davis*, 25 HOUS. J. INT’L. L. 195, 216–26 (2002) (discussing developments in immigration law and the detention of aliens after *Zadvydas*).

expeditiously was needed not only to conform to the Court's ruling but to offer relief to detained aliens. On November 14, 2001, the Department of Justice (DOJ), "pursuant to the . . . Supreme Court decision . . . , [published] an interim rule in the Federal Register to amend the U.S. Immigration and Naturalization Service's . . . procedures governing the review process of aliens who are subject to a final order of removal, deportation, or exclusion."<sup>141</sup> The interim rule, which was subject to a sixty-day public comment period, implemented new procedures to determine: "(1) whether aliens with final orders of removal are likely to be removed within a reasonable amount of time; and (2) whether [such aliens] should remain in INS custody or be released into the United States pending their removal."<sup>142</sup>

### A. *Implementing the New Review Procedures*

Actually implementing the new review procedures will depend extensively on the Department of State. According to the DOJ, the Department of State's expertise will be needed in order to determine the feasibility of removing "thousands of aliens to many different countries."<sup>143</sup> The *Zadvydas* Court stressed the importance of acknowledging the experience of the Executive Branch in immigration matters and the need to work together as one in order to be successful in this large endeavor.<sup>144</sup> The Executive Branch

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<sup>141</sup> United States Department of Justice, *Justice Department Implements Zadvydas v. Davis Supreme Court Decision*, (reporting that the interim rule would amend the current INS rules to comport with *Zadvydas*), at [http://www.usdoj.gov/opa/pr/2001/November/01\\_ins\\_595.htm](http://www.usdoj.gov/opa/pr/2001/November/01_ins_595.htm) (Nov. 14, 2001) (last visited Apr. 14, 2003)

<sup>142</sup> *Id.* On July 24, 2001—about one month after the *Zadvydas* ruling, and two-and-a-half months before the publication of the interim rule—the United States Attorney General instructed the Acting Commissioner of the INS to do the following to comply with *Zadvydas*:

[I]mmediately renew efforts to remove all aliens in post-order detention, placing special emphasis on aliens who have been detained the longest . . . expeditiously conclude its ongoing file review for all aliens who have remained in post-order detention for ninety days or more . . . immediately begin accepting requests, submitted in writing, by detained aliens who contend that there is no significant likelihood of their removal in the reasonably foreseeable future . . . respond in writing . . . to any such written submission, prioritizing the cases of aliens who have been detained the longest . . . [and ensure that] [n]o alien who has previously been determined under existing procedures . . . to pose a danger to the community will be released until his or her case has been processed through the INS review and the INS has made a determination, based on available information, that there is no significant likelihood of the alien's removal in the reasonably foreseeable future.

DOJ Notice of Memorandum, 66 Fed. Reg. 38,434 (July 24, 2001).

<sup>143</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,968 (Nov. 14, 2001) (codified at 8 C.F.R. pts. 3 and 241).

<sup>144</sup> *Zadvydas*, 533 U.S. at 700. Working together as a team will be especially important,

plays a key role in fulfilling the goal of alien removal by working on repatriation issues with the consular officers of foreign countries.<sup>145</sup> The United States can initiate the process by requesting necessary travel documents from the foreign countries.<sup>146</sup> Another function of the Executive Branch is to maintain diplomatic relations with foreign governments in order to obtain necessary documentation.<sup>147</sup> Achieving removal requires a cohesive effort between the Executive Branch, the country of return, and the alien.<sup>148</sup>

### *B. The Interim Rule's Procedural Effect*

The interim rule structurally changes the existing statute by integrating a new section, 241.13, into the existing statute.<sup>149</sup> Section 241.13 will come into play once the ninety-day removal period has expired.<sup>150</sup> The DOJ indicated that the new section will provide the INS with a procedure to determine "whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future."<sup>151</sup> This was the goal the Supreme Court sought to achieve after *Zadvydas*.<sup>152</sup>

Section 241.13 pertains to: "[1] Aliens who have been admitted to the United States . . . and who are later ordered removed . . .; [2] Other deportable aliens who are determined to be a danger to the community or a flight risk; and [3] Inadmissible aliens who are present in the United States without inspection."<sup>153</sup> Like the

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now, in light of the September 11, 2001 terrorist attacks on this country. *See infra* notes 194–210 and accompanying text.

<sup>145</sup> *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,968 (characterizing the entire process as informal since there are relatively few formal written agreements between the U.S. and foreign countries).

<sup>146</sup> *See id.* (describing the "[e]fforts to secure travel documents and normalize immigration relations with other governments" as a back and forth process). The DOJ explained that the removal of individual aliens is an on-going process and that there are continuous efforts to develop comprehensive solutions and gain the cooperation of all nations. *Id.*

<sup>147</sup> *See id.* (noting that the INS has been successful in effectuating the removal of aliens to all countries).

<sup>148</sup> *See id.* (explaining that the alien is required to cooperate with the INS, comply with INS provisions, and obtain any requested documentation that may be needed to complete his or her removal).

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

<sup>151</sup> *Id.*

<sup>152</sup> *See Zadvydas*, 533 U.S. at 699 (noting that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute"). Moreover, the Court stated, if an alien convincingly shows removal is unforeseeable, the Government bears the burden of rebutting that evidence. *See id.* at 701.

<sup>153</sup> *See* Apprehension and Detention of Aliens Ordered Removed, 8 C.F.R. 241.13(b)(3); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,969

2000]

Indefinite Detention

1231

Supreme Court, the interim rule draws a bright line distinction between aliens who have lawfully gained admission into the United States and aliens seeking admission.<sup>154</sup>

Pursuant to section 241.13, the alien may request his or her release by asserting that the likelihood of removal in the reasonably foreseeable future does not exist.<sup>155</sup> However, in order to be able to invoke this privilege, the alien must show, to the satisfaction of the INS, that he or she has complied with all removal orders and has cooperated with the INS, to the extent necessary, to accomplish his or her removal.<sup>156</sup> The alien will also be able to present evidence demonstrating that removal to a particular country is unlikely.<sup>157</sup> This is so even if the INS has effected the removal of other aliens to that country or to other countries in the past.<sup>158</sup> Thus, the new rule grants the alien the opportunity to show the INS that his or her "own situation is materially different such that he or she is unlikely to be removed."<sup>159</sup> However, great deference will be given to the INS if history indicates "that [the INS] has been successful in returning most aliens to a particular country."<sup>160</sup>

There is no specific time limit for the INS's final decision concerning the likelihood of the alien's removal, however, the time period must be reasonable.<sup>161</sup> Upon determination that the alien's removal is not significantly likely in the reasonably foreseeable future, the INS will make the appropriate arrangements necessary

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(noting that section 241.13 does not apply to either arriving aliens or to aliens outside of the United States border).

<sup>154</sup> See Apprehension and Detention of Aliens Ordered Removed, 8 C.F.R. 241.13(b)(3); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,969.

<sup>155</sup> See 8 C.F.R. 241.13(d)(1); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,970.

<sup>156</sup> See 8 C.F.R. 241.13(d)(2), (e)(2); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,970 (providing an alien, who has not met the requirements, with a written notice setting forth the findings and specifying the actions the alien must take in order to be in compliance).

<sup>157</sup> See 8 C.F.R. 241.13(e); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,970.

<sup>158</sup> See 8 C.F.R. 241.13(e)(4); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,970.

<sup>159</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,970 (codified at 8 C.F.R. 241.13).

<sup>160</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,970 (codified at 8 C.F.R. 241.13).

<sup>161</sup> See 8 C.F.R. 241.13; 66 Fed. Reg. 56,970 (noting that the review process itself should not cause the type of prolonged detention that the *Zadvydas* Court rejected). For instance, detaining the alien for a period longer than necessary may harm the alien especially if he or she is the sole provider for a family or is ill and requires medical treatment.

to release the alien from custody.<sup>162</sup> Yet, even if the INS finds that there is no likelihood of removal in the reasonably foreseeable future, the INS, pursuant to section 241.14, may continue to detain the alien upon “special circumstances.”<sup>163</sup> Section 241.14 only allows prolonged detention in cases of:

“(1) Highly contagious diseases posing a danger to the public; (2) foreign policy concerns; (3) national security and terrorism concerns; and (4) individuals who are specially dangerous due to a mental condition or personality disorder.”<sup>164</sup> Further, if the INS subsequently determines that a significant likelihood of removal in the reasonably foreseeable future exists, the alien’s detention will again be governed by section 241.4.<sup>165</sup>

### *C. The Interim Rule’s Substantive Effect*

It is important to note the difference between section 241.4 and the new rule (section 241.13). Section 241.4 will still govern all “aliens under a final order of removal.”<sup>166</sup> It will also govern those aliens that request a review under section 241.13 and those aliens detained under special circumstances.<sup>167</sup> Therefore, implementing the new rule (section 241.13) will not nullify the existing rule (section 241.4).<sup>168</sup> Section 241.13 merely provides a procedure “for the [INS] to make a determination as to whether there is a significant likelihood that the alien will be removed in the

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<sup>162</sup> 8 C.F.R. §241.13(g)(1); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,971 (requiring that a written notice, explaining the reasons for the determination, be included in the alien’s file). Released aliens may be subject to an order of supervision imposing conditions. 8 C.F.R. 241.13(h). If an alien violates the conditions, as set forth in the order, he or she will be returned to INS custody. *Id.* A goal of imposing conditions on the alien is to ensure public safety. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,971.

<sup>163</sup> See 8 C.F.R. §241.14; Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,972 (providing for the continued detention of aliens who would pose a danger to the public).

<sup>164</sup> See Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,972 (codified at 8 C.F.R. §241.14(b–d), (f)).

<sup>165</sup> 8 C.F.R. 241.13(i)(2); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,971.

<sup>166</sup> See 8 C.F.R. 241.13(a); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,969.

<sup>167</sup> See 8 C.F.R. 241.13(b), (e)(6); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,969.

<sup>168</sup> See 8 C.F.R. 241.13(b); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,971–72 (noting that the changes are limited and that the new “rule does not make substantive changes to the existing post-removal period detention standards”).

2000]

Indefinite Detention

1233

reasonably foreseeable future.”<sup>169</sup> Upon the INS’ determination that the alien’s removal is not significantly likely in the reasonable foreseeable future, “the alien’s detention will be governed by § 241.13 rather than by § 241.4.”<sup>170</sup> However, the alien’s detention will again be governed by section 241.4 if, based on a change of circumstances, the INS subsequently finds that removal will be likely in the reasonably foreseeable future.<sup>171</sup> “In that event, the [INS] may return the alien to detention in connection with the removal, and any issues relating to the detention or release of the alien pending his or her removal will once again be governed by the standards of § 241.4.”<sup>172</sup>

#### *D. The Societal Implications of Zadvydas*

Some people have suggested the Court’s decision in *Zadvydas* “may herald a welcome . . . period of compassion and a positive reform in immigration law.”<sup>173</sup> However, the United States still has significant hurdles to overcome. For instance, this nation must continue to work closely with other countries, ensure public safety, and handle released and detained aliens.

Presently, there are various countries such as Cambodia, Vietnam, Laos and Cuba that refuse to accept or take back criminal aliens.<sup>174</sup> Without a willing and accepting country, the INS will have no other alternative than to release an alien from its custody. Obviously, maintaining a good working relationship with foreign countries would be in the best interest of this country and the detained alien. Even when other countries are uncooperative, the

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<sup>169</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,968 (explaining that this rule is implemented to conform to the Court’s decision in *Zadvydas*) (codified at 8 C.F.R. 241.13(a)).

<sup>170</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,969; see 8 C.F.R. 241.13(b).

<sup>171</sup> Continued Detention of Aliens Subject to Final Orders of Removal, at 66 Fed. Reg. 56,971 (as codified at 8 C.F.R. 241.13(i)(2)).

<sup>172</sup> *Id.* at 56,971 (as codified at 8 C.F.R. 241.13(i)(2)).

<sup>173</sup> See Farhad Sethna, *The Pendulum Swings Back: Supreme Court Decisions Offer Relief to Immigrants* (2001) (indicating that the *Zadvydas* decision is a “glimmer of hope that the anti-immigrant pendulum is showing signs of swinging toward a more reasonable, just, and centrist philosophy”), at <http://www.immigration-america.com/pendulum.html>; see also T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (suggesting that the restrictions on Congress’ immigration authority “may represent a radical shift, a turning point for immigration law”).

<sup>174</sup> See Lise Olsen, *Ruling Could Free Dangerous Aliens, Ashcroft Warns*, THE SEATTLE POST-INTELLIGENCER, July 21, 2001, at A3 (finding this unacceptable, Ashcroft was attempting to negotiate treaties with these countries), available at 2001 WL 3563331.

United States needs to continue with diplomatic efforts to reach a mutual agreement.<sup>175</sup> One way to achieve a more uniform standard might be to make the written agreements with other countries formalized.<sup>176</sup> Another way, according to the Attorney General, is to stop granting visas to citizens of countries that refuse to take back criminal aliens.<sup>177</sup> The concept is that “[a]ny government that insists on saddling Americans with their bad eggs should be made to pay.”<sup>178</sup>

Another concern is public safety. The Court’s decision in *Zadvydas* could cause the release of approximately “3,400 potentially criminal aliens.”<sup>179</sup> According to the Attorney General, it will be “a great challenge to our responsibility to ensure safety for the American people” and he will “do everything he [can] to keep dangerous aliens in custody, deport them or, where possible, charge them with new crimes.”<sup>180</sup> Others have expressed different sentiments, regarding the release of many detained aliens, stating that they are looking forward to their release.<sup>181</sup> The Court did address the public safety issue by stating that an “alien’s release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of

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<sup>175</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,968.

<sup>176</sup> *But see* 66 Fed. Reg. at 56,968 (stating that “the United States requests and receives travel documents from most nations without a formalized written agreement” and that “[f]ormal repatriation agreements are uncommon”).

<sup>177</sup> *See* Olsen, *supra* note 174, at A3.

<sup>178</sup> Editorial, *Immigrants Who Break Laws*, THE HARTFORD COURANT, Aug. 15, 2001, at A14, available at 2001 WL 25317071.

<sup>179</sup> Olsen, *supra* note 174, at A3. In January 2003, the INS issued a monthly statistical analysis reporting the removal of 14,556 aliens from the United States of which 6,321 of those aliens were criminals. BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEP’T OF HOMELAND SECURITY, MONTHLY STATISTICAL REPORT, REMOVALS, available at <http://www.immigration.gov/graphics/aboutus/statistics/msrjan03/REMOVAL.HTM> (last visited Mar. 23, 2003).

<sup>180</sup> Olsen, *supra* note 174. Aliens can no longer be detained at the whim of the United States Attorney General.

<sup>181</sup> *See* Joel Pfeffer, *Immigration Fairness: Western Pennsylvania Has a Strong Interest in More Welcoming Policies for Immigrants*, PITTSBURGH POST-GAZETTE, July 13, 2001, at A15 (discussing how Allegheny County in Pennsylvania would like to increase their population of educated immigrants, especially those currently obtaining their higher education; without this increase in the labor pool, the economy of the region could be in jeopardy), available at 2001 WL 22209592. *See generally* Harry Valetk, Note: “I Cannot Eat Air!”: An Economic Analysis of International Immigration Law for the 21st Century, 7 CARDOZO J. INT’L & COMP. L. 141, 155–56 (1999) (citing the lower labor costs that result from immigration—which enable businesses to be more competitive—and suggesting that on whole the United States benefits economically from immigrants).

2000]

Indefinite Detention

1235

those conditions.”<sup>182</sup>

Additionally, aliens that are released may need government assistance. The Department of Health and Human Services has provided that aliens who fall into certain categories may qualify for assistance from benefit-granting agencies.<sup>183</sup> The government may have to provide those aliens who do not meet the specific criteria with assistance such as education and job training in order to help these individuals become productive members of society.

Another prevalent issue involves the conditions inside detention centers. Questions have arisen as to whether or not the United States is treating detainees in a humane manner. For example, various religious leaders from the National Council of Churches visited an INS detention center in New York City.<sup>184</sup> The religious leaders were shocked to discover the living conditions of asylum seekers.<sup>185</sup> “The center’s detainees are locked in their dormitories [twenty-two to twenty-three] hours a day.”<sup>186</sup> Moreover, they are only allowed [sixty to ninety] minutes of recreation per day.<sup>187</sup> There are uniformed guards constantly on watch.<sup>188</sup> One of the religious leaders had spent eleven years as a prison chaplain and described what he had seen on that day as being equivalent to a prison.<sup>189</sup> These findings tend to contradict the notion that detention and deportation are not to serve as forms of punishment. For instance, during a briefing concerning Immigration policies, one of the panelists argued, “[d]eportation is not punishment. Deportation is withdrawing the permission to remain as a guest in our home, and until you embrace America by becoming one of

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<sup>182</sup> *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001).

<sup>183</sup> Confirmation of Immigration Status for Recently-Released Indefinite Detainees, 66 Fed. Reg. 66,910 (Dec. 27, 2001) (noting that the benefits and services funded by the Office of Refugee Resettlement will only be available to certain refugees, asylees, Cuban and Haitian entrants, certain Amerasians from Vietnam, and victims of severe forms of trafficking).

<sup>184</sup> National Council of Churches, *People Fleeing Persecution Held In “Worse Than Prison” Conditions in U.S.*, Apr. 30, 2001 (describing the shock of leaders from Lutheran, Catholic, Jesuit, Hebrew, and Episcopal institutions as well as aides to three senators and representatives from the Lawyers Committee for Human Rights at the conditions of an immigration detention center in New York City), available at <http://www.nccusa.org/news/01news38.html> (last visited May 16, 2003).

<sup>185</sup> *See id.* (expressing “shock that people seeking political asylum in the United States [were being] held in ‘worse than prison’ conditions”).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (noting further that the detainees’ ability to recreate outdoors was entirely weather dependent and that indoor facilities were “cramped”).

<sup>188</sup> *See id.*

<sup>189</sup> *Id.*

us . . . you are here on our terms, not on yours.”<sup>190</sup>

Although the religious leaders were mainly sympathizing with the treatment of asylum seekers and not criminal detainees, it is evident that detention center conditions need to be improved. In Fiscal Year 2001, the Bureau of Prisons (BOP) expected an increase in the inmate population of 13,230 to a total of 158,355.<sup>191</sup> Presently the DOJ is being faced with two major problems concerning detention centers: 1) prison overcrowding, and 2) detention space and infrastructure.<sup>192</sup> The DOJ has implemented objectives to minimize these problems. For Fiscal year 2002, the objective regarding detention was to “[p]rovide for the safe, secure and humane confinement of persons who are detained while awaiting trial or sentencing, a hearing on their immigration status, or deportation.”<sup>193</sup> The goal was to “[e]nsure adequate, cost effective detention capacity and efficiently operate the Justice Prisoner and Alien Transportation System (JPATS).”<sup>194</sup> JPATS was created in 1995 and its main function is to transport aliens in a safe, efficient, and cost effective manner between different institutions and for

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<sup>190</sup> U.S. COMMISSION ON CIVIL RIGHTS, BRIEFING ON BOUNDARIES OF JUSTICE: IMMIGRATION POLICIES POST-SEPTEMBER 11TH, (Oct. 12, 2001) (addressing immigration policies after September 11 and quoting Mr. Mark Krikorian, executive director of the Center for Immigration Studies), *available at* <http://www.usccr.gov/pubs/tragedy/imm1012/panel101.htm> (last visited May 16, 2003). In fact, the notion that deportation is not punishment has been with us since 1893 when the Supreme Court in *Fong Yue Ting v. United States* stated:

[t]he order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. 149 U.S. 698, 730 (1893).

<sup>191</sup> USDOJ, FISCAL YEAR 2000 PERFORMANCE REPORT & FISCAL YEAR 2002 PERFORMANCE PLAN: STRATEGIC GOAL FIVE (noting that the DOJ has three components—the Bureau of Prisons (BOP), the United States Marshals Service (USMS), and the Immigration and Naturalization Service (INS)—that are responsible for confinement of certain persons including those awaiting immigration hearings or deportation), *available at* <http://www.usdoj.gov/ag/annualreports/pr2000/NEWSG5.htm> (last visited Mar. 1, 2003). Only the BOP and the INS operate federal detention centers. *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* The DOJ lists three strategies to meet the objective. The first strategy is to “[a]cquire needed bedspace capacity through a multi-pronged approach of state and local agreements, contracts with private vendors, construction and operation of federal detention facilities, and where appropriate, the use of alternatives.” *Id.* The second strategy is to “[i]mprove management of detention resources through more accurate forecasting of detention needs, better coordination, strengthened oversight and other means.” *Id.* The third strategy is to “[o]perate the Justice Prisoner Alien Transportation System (JPATS) efficiently and effectively.” *Id.*

<sup>194</sup> *Id.*

deportation.<sup>195</sup> The BOP also has plans on conducting additional construction in order to provide “bedspace for higher-security, long-term INS detainees who cannot be repatriated to their homeland.”<sup>196</sup>

### *E. Post September 11, 2001*

In light of the sudden, horrifying terrorist attacks that took the lives of thousands of innocent people on September 11, 2001, Congress passed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act or the Act).<sup>197</sup> The Patriot Act grants the Attorney General the power to take into custody and indefinitely detain an alien if he has “reasonable grounds to believe” that the alien is a suspected terrorist or has engaged in terrorist activity pursuant to the Act.<sup>198</sup> Arguably, most Americans are in favor of the Act because they believe it will help to ensure this nation’s safety and prevent future attacks.<sup>199</sup> However, some are opposed to the Patriot Act because they believe that it allows immigrants who are not terrorists to be detained indefinitely.<sup>200</sup> Indeed, this assertion of indefinite detention raises questions in light of the Supreme Court’s ruling in *Zadvydas*. The Court in *Zadvydas* noted that “[t]he provision authorizing detention does not apply narrowly to ‘a small segment of particularly dangerous individuals,’ ... say suspected terrorists” for example.<sup>201</sup> As suggested in the interim rule, the Court “acknowledged that there may be cases involving ‘special circumstances,’ such as those

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>198</sup> Pub.L.No. 107-56, §412(a); 115 Stat. 272, 350–51 (adding a new section 236A to the Immigration and Nationality Act).

<sup>199</sup> *Public Opinion: Civil Liberties*, Public Agenda Special Edition, Terrorism, at [http://www.publicagenda.org/specials/terrorism/terror\\_pubopinion4.htm](http://www.publicagenda.org/specials/terrorism/terror_pubopinion4.htm) (last visited Mar. 17, 2003) (citing an ABC News poll, wherein eighty percent of Americans do not believe that their civil liberties have been severely restricted by the government).

<sup>200</sup> See American Civil Liberties Union, *How the USA-PATRIOT Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists*, at <http://archive.aclu.org/congress/1102301e.html> (Oct. 23, 2001); see also American Civil Liberties Union, *USA Patriot Act Boosts Government Powers While Cutting Back on Traditional Checks and Balances* (arguing that the “Act confers new and unprecedented detention authority on the Attorney General based on vague and unspecified predictions of threats to the national security”), at <http://archive.aclu.org/congress/1110101a.html> (Nov. 1, 2001).

<sup>201</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 691 (citations omitted).

involving terrorists or specially dangerous individuals, in which continued detention may be appropriate even if removal is unlikely in the reasonably foreseeable future.”<sup>202</sup> However, even such indefinite detention is “subject to strong procedural protections.”<sup>203</sup>

The Court in *Zadvydas* expressed concern that the detention provision applied “broadly to aliens ordered removed for many and various reasons, including tourist visa violations.”<sup>204</sup> Although the PATRIOT Act, on its face, targets suspected terrorists, it may be indirectly targeting every immigrant. Thus, the main issue is whether the PATRIOT Act conforms to the Court’s ruling in *Zadvydas*. According to the American Civil Liberties Union (ACLU), it does not.<sup>205</sup> For example, the ACLU argues that tourist visa violators “could face indefinite detention” if the Attorney General believes that such an individual could present a threat to national security or to the safety of anyone in the United States.<sup>206</sup> The ACLU alleges that the PATRIOT Act fails to conform to the constitutional test set forth in *Zadvydas*.<sup>207</sup> The PATRIOT Act does not grant indefinite detainees an opportunity to defend the charge of terrorism. Additionally, the Act fails to provide procedural protections such as requiring that a criminal charge be proven beyond a reasonable doubt or deportation only be ordered based on clear, convincing and unequivocal evidence.<sup>208</sup>

Generally, the United States has struggled to find a balance between the nation’s freedom and security.<sup>209</sup> As was succinctly

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<sup>202</sup> Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,968 (codified at 8 C.F.R. 241.4); see *Zadvydas*, 533 U.S. at 691. The interim rule applies to deportable aliens who are determined to pose a danger to the community. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,969. Special circumstances may involve “national security or terrorism grounds.” *Id.* at 56,972.

<sup>203</sup> See *Zadvydas*, 533 U.S. at 691 (upholding “preventive detention based on dangerousness only when limited to specially dangerous individuals [such as terrorists] and subject to strong procedural protections”).

<sup>204</sup> *Id.*

<sup>205</sup> See American Civil Liberties Union, *How the USA-PATRIOT Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists*, at <http://archive.aclu.org/congress/1102301e.html> (Oct. 23, 2001).

<sup>206</sup> *Id.*

<sup>207</sup> See *Zadvydas*, 533 U.S. at 690–91. (noting that the *Zadvydas* Court held that a law that allowed for the indefinite civil detention of immigrants would pose a “serious constitutional problem” while recognizing that indefinite preventive detentions of terrorists or other dangerous individuals still required “strong procedural protections”).

<sup>208</sup> See American Civil Liberties Union, *How the USA-PATRIOT Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists*, at <http://archive.aclu.org/congress/1102301e.html> (Oct. 23, 2001).

<sup>209</sup> See generally Editorial, *Security and Liberty*, ST. PETERSBURG TIMES, Sept. 22, 2001, at 16A, available at 2001 WL 27115889; see also Craig Gilbert, *Lawmakers in Spotlight over Bill*

2000]

Indefinite Detention

1239

stated in a *St. Petersburg Times* Editorial:

The United States has not always made responsible choices in balancing freedom and security. After the attack on Pearl Harbor, the U.S. government interned 120,000 Japanese-Americans who were viewed as a threat to national security merely because they were of Japanese descent. If history teaches us anything, it is that we should be most vigilant in the protection of our liberties during moments of national crisis and anxiety.<sup>210</sup>

### CONCLUSION

The Supreme Court in *Zadvydas v. Davis* set an extremely important precedent. It not only serves as a reminder that aliens within the United States are afforded constitutional rights, but it reinforces the notion that freedom is a valuable interest, worthy of zealous protection. The Court justifiably concluded that 8 U.S.C. § 1231(a)(6) did not grant the Attorney General the power to indefinitely detain aliens past the post-removal-period. The Court's decision is in accordance with the scope and meaning of the Constitution's Fifth Amendment protections.

It cannot be forgotten that the Due Process Clause of the Fifth Amendment applies to *any person* within the United States. Moreover, there are an abundance of cases, spanning more than a century, stressing the importance of granting constitutional rights to individuals within the United States. The Court carefully analyzed Congress' intent, the statute's text, and the legislative history before arriving at a conclusion.

The fact that the Court's decision is favorable to criminal aliens should not be a determining factor in judging the soundness of the decision. The Court has not suddenly opened the flood gates effectuating the immediate release of hundreds of aliens with

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*on Terrorism*, JS Online, MILWAUKEE JOURNAL SENTINEL (reporting on the Congress' heated debates in attempting to balance police powers and civil liberties while establishing anti-terrorism laws), at [http://www.jsonline.com/news/attack/Oct01/liberty\\_14101301.asp](http://www.jsonline.com/news/attack/Oct01/liberty_14101301.asp) (Oct. 13, 2001); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083-86 (2002) (reviewing the historical debate between freedom and security in light of the terrorist attacks on September 11, 2001, and the long term impact of favoring national security over civil liberties).

<sup>210</sup> Editorial *Security and Liberty*, ST. PETERSBURG TIMES, Sept. 22, 2001, at 16A (contending further that acting on our constitutional right to question legislation is the "highest form of patriotism"), available at 2001 WL 27115889.

criminal backgrounds into America's streets. To the contrary, an alien must still overcome many procedural hurdles in order to be released. There are even more procedural hurdles for aliens who fall within the "special circumstances" category. The Court duly recognized the importance of ensuring public safety while at the same time noting that it is often not the purpose behind indefinite detention. The Court should not be criticized for attempting to find a balance between a person's guaranteed, constitutional rights and the nation's safety.

There will be many hurdles that this country will need to overcome such as determining what standards should be implemented in handling detained aliens, improving the conditions of detention facilities, and determining what standards should be employed in order to effectively handle released, criminal aliens. The Court properly left the task of overcoming and solving these issues to agencies such as the INS. Perhaps the ultimate challenge will be to determine whether the PATRIOT Act conforms to the Court's ruling in *Zadvydas* and whether it is constitutionally sound. Although challenging the constitutionality of the Act may seem futile because of strong, prevalent public bias in favor of it, the text of the Due Process Clause will provide substance and guidance.