FOURTEENTH AMENDMENT—THE DUE PROCESS CLAUSE—IMMIGRATION AND NATIONALITY ACT—IT IS UNLAWFUL FOR THE GOVERNMENT TO DETAIN AN ALIEN INDEFINITELY BEYOND THE STATUTORILY MANDATED REMOVAL PERIOD—*Zadvydas v. Davis*, 121 S. Ct. 2491 (2001).

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Most immigrants to America found their love of their old homes betrayed. . .their countries abandoned them. In America, they found the possibility of a new love, the chance to nurture new selves. . . . A continuing part of the immigrant's education is the comparison between the anticipated or imagined America and the real country. The anticipation depends on time and place, but the reality is always startling.[1]

I. INTRODUCTION

The due process protection that the Fifth Amendment affords extends beyond simply United States citizens; all "persons" within the United States' borders are protected against violations.[2] Accordingly, the United States Supreme Court has recognized that this provision applies to "all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality,"[3] thereby making it apparent that aliens should receive some constitutional due process protections. The issue becomes more complicated, however, when the extent of an alien's constitutional protections and which branch of government is most appropriate to extend those protections are explored.

Arguably, the source of the complexity is the Constitution. In other words, while conferring some constitutional protections to aliens under the Fifth Amendment, the Constitution simultaneously confers "plenary" and "sovereign"

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[1] Henry Grunwald, *America Is Where You Are Happy*, TIME, July 8, 1985, at 100, *reprinted in* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 211 (2d ed. 1997).

[2] U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part, "[n]o *person* shall. . .be deprived of life, liberty or property, without due process of law. . . ." (emphasis added). *Id.*

[3] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

power upon the political and executive branches of government to make decisions concerning exclusion and deportation.[4] The Supreme Court practically indoctrinated this discrepancy when the Court announced, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[5]

The extent of constitutional protections for aliens becomes even more deeply convoluted upon analysis of whether the alien is either within the United States or attempting entry. In 1996, the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA),[6] characterized aliens who attempted and were denied entry to the country as a "excludable" aliens[7] and those who were already within the country but were ordered removed as "deportable" aliens.[8]

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[4] *See e.g.*, Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, 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."); Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893) ("The question whether, and upon what conditions, [ ] aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress. . ."); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

See also David M. Grable, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, c, 838-39 (1998) (arguing that Congress' plenary power over immigration has created a conflict between immigration law and the larger body of constitutional law itself and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 should be used as a tool to repair that conflict).

[5] United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("[T]he decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are* due process of law.") (emphasis added).

[6] Illegal Immigration Reform and Immigration Responsibility Act of 1996 (codified as amended in scattered sections of 8 U.S.C.) (amending numerous sections of the Immigration and Nationality Act (INA)).

[7] The sections of the IIRIRA as applied to the category of "excludable aliens" has been codified in 8 U.S.C. § 1182 ("Excludable Aliens") (2001).

[8] The sections of the IIRIRA as applied to the category of "deportable aliens" has been codified at 8 U.S.C. § 1227 ("Deportable Aliens") (2001). *See also* STEPHEN H. LEGOMSKY,

This language attempted to clearly define a distinction that had already become the rule to determine the extent to which aliens should be afforded constitutional protections.[9] Thus, even before the passage of the IIRIRA, the Court was willing to concede that greater constitutional protections should be afforded aliens who had made it through our borders than those who were on the brink of entry and detained.[10]

When considering the widely debated issue of indefinite detention, the willingness to provide greater constitutional protection to only those aliens who have successfully entered into the United States' borders flies in the face of logic. Many critics find it difficult to square the due process that has been historically afforded to aliens with the utter lack of such protections for aliens who, although physically within the borders of the United States, have been ordered deported.[11]

It is against this backdrop of seeming contradiction that the courts of appeals have come to address the constitutional validity of the portions of the Immigration and Nationality Act that has been used by the Government to detain aliens

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IMMIGRATION AND REFUGEE LAW AND POLICY 2 (2d ed. 1997) (explaining the change in the statutory language).

The year 1996 has been characterized by some as a year of "sweeping immigration reform." See 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, 1262-63 (2000) (noting the passage of the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act, arguably, imposed further limitations on an alien's access to the judicial process).

[9] *See* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing.") (citations omitted). There has been some reference to this concept as the "entry fiction." *See* Chopin, *supra* note 8, at 1268.

[10] *Mezei*, 345 U.S. at 212.

[11] Clay McCaslin, *'My Jailor is My Judge': Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TULANE L. REV. 193, 230 (2000) (arguing that a lawful permanent resident should not lose the constitutional protections he supposedly gained upon entry once an order of deportation has been issued against him); Marisel Acosta, *'Unremovable' Criminal Resident Aliens Awaiting Deportation: Can The INS Detain Them Indefinitely?* 73 TEMPLE L. REV. 1363, 1387 (2000) (arguing that "[b]ecause the Due Process Clause protects all persons within the United States, both the text of the Amendment and the Court's precedent suggest that resident aliens, unlike inadmissible aliens, have a constitutional right to freedom from bodily restraint").

for an indefinite period where they have been ordered deported.[12] Generally, the Government has argued that the Attorney General has the authority to detain aliens that had been ordered deported beyond the statutorily mandated removal period.[13] Conversely, the detainees have maintained that such an indefinite detention acts as a direct barrier to their ability to reap the benefits of their liberty interests.[14]

The methods with which courts have addressed the issues surrounding indefinite detention vary greatly among circuits.[15] The Tenth Circuit, in *Duy Dac Ho v. Greene,*[16] found that the post-removal-detention statute did not limit the length of time for which the Attorney General could detain an alien that had been ordered deported.[17] According to the court, because Congress did not expressly provide a time limitation, it implicitly authorized the period to be left to the discretion of the Attorney General.[18] In the Fifth Circuit the court was also asked to determine the constitutional validity of the post-removal-detention statute in *Zadvydas v. Underdown.*[19] The Fifth Circuit determined, using an analysis similar to that of the Tenth Circuit, that Congress' failure to impose a time limitation in the statute indicated that such a determination should be left to the Attorney General.[20] The United States Court of Appeals for the Ninth Circuit, however,

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[12] 8 U.S.C. § 1231(a)(6) (2001) [hereinafter "the post-removal-detention statute"]. The text of this section provides in pertinent part: "[a]n alien ordered removed who is inadmissible. . .removable. . .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. . . ." *Id.*

[13] *See infra* Part IIB.

[14] *See infra* Part IIB.

[15] *See infra* notes 16-22 and accompanying text.

[16] 204 F.3d 1045 (10th Cir. 2000).

[17] *Id.*

[18] *Id.* at 1057 ("This court will not substitute its judgment for that of Congress by reading into the statute a time limit that is not included in the plain language of the statute."). *Id.*

[19] 185 F.3d 279 (5th Cir. 1999).

[20] *Id.* at 286 ("While the statute currently is not a model of clarity in respect to its retroactive application to an alien in Zadvydas' position, we find the INS' construction reasonable."); *see also infra* notes 42-68 and accompanying text.

utilized a somewhat different approach in *Kim Ho Ma v. Reno*.[21] In *Ma*, the Ninth Circuit engaged in the practice of constitutional avoidance and by implying a requirement of reasonableness into the length of the detention, found that the Government was without authority to detain Ma as long as it had.[22] These circuit splits were resolved in *Zadvydas v. Davis*.

The Supreme Court had numerous options when the issue of indefinite detention reached the Court in *Zadvydas v. Davis*.[23] First, the Court could have found the post-removal-detention statute in clear contravention with Due Process principles since it deprived aliens, who had been admitted to the country, their established liberty protections. Alternatively, the Court could have determined that the post-removal period detention statute unambiguously gave the Attorney General the authority to establish the appropriate length of detention for an alien who had been ordered removed. On the other hand, the Court could engage in constitutional avoidance that would impose limitations on the Attorney General's authority. The Supreme Court's ultimate approach to addressing the constitutional issues surrounding the post-removal-detention statute in *Zadvydas* was a combination of all three options. While the Court implied a utilization of constitutional avoidance, the majority in *Zadvydas* directly addressed the unconstitutionality of indefinite detention in the civil context.[24]

II. STATEMENT OF THE CASE

The United States Supreme Court granted certiorari to review the constitutional and statutory validity of the continued detention of aliens who have been ordered deported.[25] In *Zadvydas v. Davis*, the Court consolidated two cases that differed in their resolution of this issue: in *Zadvydas v. Underdown*, a request for review was made by an alien whose continued detention was authorized by the Fifth Circuit; in *Ma v. Reno* the Government requested review because the Ninth

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[21] 208 F.3d 815 (9th Cir. 2000).

[22] *Id.* at 822 ("[W]e construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which an alien has already 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, we conclude that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period."); *see also infra* notes 42-68 and accompanying text.

[23] 121 S. Ct. 2491 (2001).

[24] *See infra* Part IV(A) (providing an analysis of Justice Breyer's majority opinion).

[25] *Zadvydas*, 121 S. Ct. at 2497.

Circuit forbid it from continuing to detain an alien.[26] In *Zadvydas*, the Court held that the Due Process Clause of the United States Constitution does not permit a statutory post-removal-period detention to extend indefinitely and, therefore, federal courts are to presume that a period of six months is reasonable and in accordance with constitutional commands.[27]

FACTS

The first case addressed by the Court involved a resident alien named Kestutis Zadvydas.[28] In 1948, Zadvydas was born in Germany to parents of Lithuanian descent.[29] He immigrated to the United States at the age of eight and remained there permanently.[30] Zadvydas developed an extensive criminal record and continuously fled the authorities and evaded deportation proceedings.[31] Eventually, Zadvydas voluntarily turned himself in to the authorities in Texas, where he was tried and convicted for his charge of intent to distribute cocaine.[32]

Upon his release from prison, pursuant to 8 U.S.C. § 1251(a)(2),[33] Zadvydas was taken into is Immigration and Naturalization Service (INS) custody and ordered deported to Germany.[34] However, Germany refused to accept Zadvydas into its borders because, although he was born within the country, he was not a German citizen.[35] Attempts to deport him to Lithuania and the Dominican Re-

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[26] *Id.* at 2496, 2497 (citing Zadvydas v. Underdown, 185 F.3d 279 (1999); Kim Ho Ma v. Reno, 208 F.3d 815 (2000)).

[27] *Id.* at 2498, 2505.

[28] *Id.* at 2495.

[29] *Id.*

[30] *Id.* at 2495-96.

[31] *Zadvydas*, 121 S. Ct. at 2496. Zadvydas' criminal record included "drug crimes, attempted robbery, attempted burglary, and theft." *Id.* at 2496.

[32] *Id.* After serving two years of a sixteen-year sentence, he was paroled. *Id.*

[33] 8 U.S.C. § 1251(a)(2) (current version at 8 U.S.C. § 1227(a)(2) (2001)) (providing a list of those crimes which result in deportation).

[34] *Zadvydas*, 121 S. Ct. at 2496. Zadvydas' applications for relief from deportation were unsuccessful. Zadvydas v. Underdown, 185 F.3d 279, 283 (5th Cir. 1999).

[35] *Zadvydas*, 121 S. Ct. at 2496.

public, the home country of his wife, failed as well.[36] Due to the difficulty in removing Zadvydas, the Attorney General held him in custody beyond the statutorily required "removal period."[37] Upon being detained beyond the allowable removal period, Zadvydas filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 requesting an order for his release.[38]

The second case consolidated for argument is factually similar to that of Zadvydas. Kim Ho Ma, a respondent in *Zadvydas*, was born in Cambodia in 1977.[39]

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[36] *Id.* The Fifth Circuit extensively addressed the history of the connection between Germany and Lithuania and the effect of this history on Zadvydas' parents as well as the failed attempts at his deportation. This piece of convoluted world history is worthy of mention for an understanding of this analysis. The court explained:

> As part of the Versailles Treaty, Germany ceded the Memel region [a section of modern Lithuania] to the Allies. Lithuania, having renewed its existence as an independent state, successfully laid claim to the area and occupied it in 1923. At that point, Zadvydas' mother and father presumably would have been Lithuanian citizens, since they were apparently born with in the resurrected nation's current borders. However, in 1939 Germany issued an ultimatum to Lithuania demanding the return of the Memel region. . .The territory was then handed back to Germany and. . .Zadvydas' mother would have become a subject of Nazi Germany. . .Lithuania then had its independence extinguished by Stalin's 1940 invasion, which placed Zadvydas' father in the Soviet orbit. . .Hitler then invaded the Soviet Union in 1941 and Lithuania was under German occupation for most of the Second World War. Late in that conflict, the Soviet army reoccupied Lithuania. . .and Lithuania remained a captive to Soviet tyranny until 1991. In the midst of all this, Zadvydas' parents were married in 1943. At some point, the couple moved (or fled) to Germany [and] spent the immediate post-war years in displaced person camps in Germany. On Nov. 21, 1948, Zadvydas was born in one of these camps. . .Due to these events, Zadvydas may in a sense be stateless. While born in Germany, he cannot claim German citizenship on that basis alone, because under German law citizenship hinges on blood (**jus sanguinis**) rather than place of birth (**jus soli**). Lithuania would seem to be the obvious alternative. . .According to the communications from the Lithuanian government, Zadvydas can apply for Lithuanian citizenship. . . .

Zadvydas, 185 F.3d at 291-92 (emphasis in original). Such was done in 1998 and that application was still pending at the time of the Court's decision. *Zadvydas*, 121 S. Ct. at 2496.

[37] *Zadvydas*, 121 S. Ct. at 2496. The "removal period" is defined by statute as 90 days from the time that the alien is ordered removed. 8 U.S.C. § 1231(a)(1)(A) (2001).

[38] *Zadvydas*, 121 S. Ct. at 2496. 8 U.S.C. § 2241 provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless. . .he is in custody in violation of the Constitution or laws or treatises of United States. . ." 8 U.S.C. § 2241(c)(3) (2001).

[39] *Zadvydas*, 121 S. Ct. at 2496.

After traveling to refugee camps as a toddler with his family, he came to the United States at the age of seven and remained as a resident alien.[40] Like Zadvydas, Ma became involved in criminal activity and, subsequent to serving two years of a 38-month sentence for manslaughter, was released to the INS' custody who implemented deportation procedures.[41]

Manslaughter qualifies as an "aggravated felony" for statutory purposes[42] and, for aliens, convictions for such crimes result in deportation.[43] The statutorily allowable removal period for Ma eventually expired without the INS successfully finding a country to which to deport him.[44] Therefore, he too filed a habeas petition seeking release.[45]

PROCEDURAL HISTORY

Kestutis Zadvydas

Zadvydas sought review by the United States District Court for the Eastern District of Louisiana after a Magistrate Judge found that the Attorney General properly detained him under her statutory authority and, therefore, was not in contravention with the Due Process Clause.[46] The district court described Zad-

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[40] *Id.* The countries to which he traveled prior to arriving in the United States included Thailand and the Philippines. *Id.*

[41] *Id.*

[42] 8 U.S.C. § 1101(a)(43)(F) (2001) (explaining that statutorily defined "crimes of violence" qualify as aggravated felonies for purposes of immigration law).

[43] 8 U.S.C. § 1227(a)(2)(A)(iii) (2001) (explaining that any alien who is convicted of an aggravated felony is deportable).

[44] The delay in Ma's release was largely attributed to the lack of a repatriation agreement between the United States and Cambodia, Ma's country of origin. *Zadvydas*, 121 S. Ct. at 2497.

[45] *Id.* at 2496. Unable to remove Ma, the INS cited several factors to justify his continued detention including: "his former gang membership, the nature of his crime and his planned participation in a prison hunger strike. . .[and the inability] 'to conclude that [he] would remain nonviolent and not violate the conditions of release.'" *Id.*

[46] United States v. Zadvydas, 986 F. Supp. 1011, 1015 (E.D. La. 1997). Magistrate Judge Moore also found that Zadvydas' waiver of counsel was voluntary, and that neither international law nor the Eight Amendment were violated. *Id.*

vydas' situation as "reminiscent of E.E. Hale's novel, 'Man Without A Country,' except that his perpetual confinement is in a prison rather than on a ship."[47] Following this analogy, the district court found that the indefinite detention of Zadvydas violated his constitutional right of substantive due process.[48] Based upon the history of habeas corpus review,[49] the court determined that "review should be limited to those situations in which deportation would result in a fundamental miscarriage of justice."[50] The district court agreed with the Magistrate Judge that Zadvydas' waiver of his right to counsel and the Immigration Judge's failure to inform him of his right to produce affidavits were constitutionally proper because deportation hearings are civil in nature.[51] Addressing whether a legal alien who has been deported may be detained indefinitely because of the INS' inability to find a country to deport him to, the court determined, "if there is nowhere to send the alien, then indefinite detention is no longer a temporary measure in the process of deportation; it is permanent confinement."[52] The court noted that

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[47] *Id.* at 1027.

[48] *Id.* At the trial court level, Zadvydas made four arguments:

> 1) that he never made a knowing waiver of his constitutional rights, including his right to counsel; 2) that his detention violates international law; 3) that his detention violates due process; 4) that his detention is in effect one for life and thus violates the Eighth Amendment prohibition against cruel and unusual punishment.

Id. at 1015. Zadvydas' procedural due process claim addressed his deportation hearing and included four prongs—he claimed:

> [1] [that] he never made a knowing waiver of his constitutional rights; [2] that because he was never told by the Immigration Judge that he could be detained for an indefinite period of time as a result of the deportation hearing, he waived several important rights and made a number of significant admissions, such as electing not to obtain an attorney and admitting he was a German citizen[;] [3] that he was never told by the Immigration Judge that his relatives' interest would be one of the principal determining factors in the outcome of the case[;] [4] [and that] he was never asked by the Immigration Judge if he could obtain affidavits from his relatives expressing their interest.

Id. at 1020.

[49] *Id.* at 1015-19.

[50] *Zadvydas*, 986 F. Supp. at 1019.

[51] *Id.* at 1021-22.

[52] *Id.* at 1026.

Zadvydas did not have citizenship status in any country and, therefore, the prospect of deporting him was not in sight, making further detainment a violation of his substantive due process rights.[53] The court granted Zadvydas' habeas corpus petition and ordered him released.[54]

The INS filed an appeal to the United States Court of Appeals for the Fifth Circuit.[55] The Fifth Circuit began its analysis with the proclamation that "[t]he law, at least in this Circuit, regarding the long-term detention of excludable aliens pending deportation is clear—such detention is allowable."[56] The court found that Zadvydas' detention was governed by the post-removal-detention statute.[57] According to this provision, an alien, like Zadvydas, who is unable to be removed within the removal period of 90 days dictated by the statute, "may be detained beyond the removal period. . . ."[58] The court noted that Zadvydas' entitlement to procedural due process protections is enhanced by the fact that he is a resident alien but that this entitlement is irrelevant since Zadvydas' concern is with his detention and not with his procedural rights.[59] In the opinion of the Fifth Circuit, Zadvydas' detention was improperly deemed "indefinite" because his options for deportation had not been fully exhausted.[60] In addressing Zadvy-

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[53] *Id.* at 1027. In light of its finding under substantive due process, the court found it unnecessary to address Zadvydas' claims under procedural due process and the Eight Amendment. *Id.* at 1027 n.6.

[54] *Id.* at 1027-28.

[55] Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999).

[56] *Id.* at 285 (citing Gisbert v. U.S. Attorney General, 988 F.2d 1437, 1448 (5th Cir. 1993)).

[57] 8 U.S.C. § 1231(a)(6) (2001).

[58] *Zadvydas*, 185 F.3d at 287 (citing 8 U.S.C. § 1231(a)(6)). The court also cited 8 C.F.R. § 241.4, which provides for continued custody of criminal aliens. *Id.*

[59] *Id.* at 290.

[60] *Id.* at 293. The Fifth Circuit found it significant that Zadvydas' application for citizenship with Lithuania was still pending because, if this application proved successful, he could be deported and his detention would not be indefinite. *Id.* at 293-94. The court also recommended other countries to which Zadvydas could potentially be deported. *Id.* Although Germany had rejected Zadvydas' application for citizenship, the court noted that this rejection was based on an application purporting that he was born in Germany. *Id.* However, the court acknowledged that such an application might be successful if the INS submitted it under the theory that Zadvydas was of German blood, since his mother's birth documentation was in German. *Id.* The court also discussed the possibility of Zadvydas successfully claiming Russian citizenship because there was some indication that Zadvydas' mother often went to Russia to

das' substantive due process argument, the appellate court pointed out the plenary power of the Government in decisions concerning immigration and found the detention legitimate in light of such power.[61] The court noted that Zadvydas' conviction of a crime created an interest in protecting the public from his potential recidivist actions and against the possibility that he will flee while awaiting deportation which, therefore, warranted his detention.[62] Accordingly, the Fifth Circuit found that Zadvydas' detention was justified and in compliance with the Due Process Clause.[63]

Kim Ho Ma

Ma filed his habeas corpus petition in the District Court for the Western District of Washington.[64] Because Ma's petition was one of over one hundred filed in this district, the court chose to designate five leading cases with petitions addressing common issues and directed that those issues be briefed and argued.[65] Five district court judges issued a joint order and a single judge applied this ruling to Ma's individual petition, concluding that there had been a violation of his substantive due process rights under the Fifth Amendment and ordering that he be released.[66]

The INS appealed the district court opinion to the United States Court of Appeals for the Ninth Circuit.[67] Recognizing that the majority of the arguments put forth by the parties, as well as the decision rendered by the district court, focused on the constitutional issues surrounding the detention, the Ninth Circuit found it

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visit her sister. *Id.* If such was true, according to the court, Zadvydas could possibly be deported to Russia. *Id.*

[61] *Id.* at 294. The court noted "the fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the plenary power concept is extinguished." *Id.* at 295.

[62] *Id.* at 296-97.

[63] *Id.* at 291-96.

[64] Kim Ho Ma v. Reno, 208 F.3d 815, 818 (9th Cir. 2000).

[65] *Id.* at 818 n.2 (citing W.D. Wash. No. CV-99-00151-RSL).

[66] *Id.*

[67] *Ma*, 208 F.3d at 815. The INS sought to stay the district court's release order but was denied by both the Court of Appeals for the Ninth Circuit and the United States Supreme Court. *Id.* at 820.

appropriate to begin by addressing whether the Government had the statutory authority to implement the detention in the first instance.[68] The INS argued that its authority to detain indefinitely arose from its statutory authority to detain beyond the dictated removal period.[69] The Ninth Circuit disagreed with this statutory reading in situations, such as that existing for Ma, where "an alien *has already 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. . . ."[70] The court construed the post-removal-detention statute as dictating that the INS not detain aliens beyond a "reasonable time" after the removal period of ninety days has ceased.[71] The court recognized that a significant due process question may exist but found it unnecessary to address, since, based on the preferred reading of the statute, such detention is without statutory authority and, therefore, impermissible.[72]

The Supreme Court granted certiorari to decide whether the Immigration and Nationality Act (INA) allowed the Attorney General to detain aliens ordered removed for an indefinite period of time or whether such a detention can only extend for a period that is deemed reasonable.[73] The Court ruled that the Government's two delineated goals in detaining such aliens, to prevent flight and to protect the community, did not justify indefinite detention.[74] The Court looked to the statute and could not glean from the statutory language any intent on the part of Congress to grant the Attorney General the authority to hold aliens or-

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[68] *Id.* at 820.

[69] *Id.* at 821.

[70] *Id.* at 822 (emphasis added).

[71] *Id.* at 818.

[72] *Id.* at 828, 830. The court acknowledged that the Fifth Circuit found differently based on constitutional principles in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999). The court pointed out that it disagreed with the Fifth Circuit's conclusion and its interpretation of supporting case law but acknowledged that the issue could, in fact, have been decided on constitutional grounds. *Id.* at 826 n.23.

See also, Matthew E. Hedberg, *Kim Ho Ma v. Reno: Cloaking Judicial Activism As Constitutional Avoidance*, 76 WASH. L. REV. 669, 670 (2001) (arguing that "the Ma [sic] court misconstrued the IIRIRA by carving out an exception to the Attorney General's detention authority").

[73] Zadvydas v. Davis, 121 S. Ct. 2491, 2495 (2001).

[74] *Id.* at 2499.

dered removed for an indefinite period of time.[75] Finally, the Court explained that an alien can be held only if it has been determined that there is no possibility of removal within "the reasonably foreseeable future."[76] Therefore, the Court required that decisions in both the Fifth and Ninth Circuits be vacated and that they be issued consistent with the Court's finding.[77]

III. PRIOR CASE HISTORY

A. STANDARDS FOR CRIMINAL DETENTION OF AN INDEFINITE DURATION

It is impossible to explore the legal issues surrounding detention of individuals without exploring applicability of the Fifth Amendment's Due Process Clause to such detentions. Such an inferential step must be made because the United States Supreme Court has explained that at the heart of the liberty interests afforded by the Due Process Clause lies the freedom from imprisonment.[78] Freedom from imprisonment has been explored in caselaw beyond that deciding immigration issues.

In 1987, in *United States v. Salerno*,[79] the Court explored the implications of pre-trial detention on an individual's Due Process rights. At issue in *Salerno* were provisions of the Bail Reform Act of 1984[80] that allowed the Government to detain an individual prior to trial on the grounds that the detention was warranted by dangerousness.[81] The respondents, members of a criminal organization who were awaiting trial on 35 counts of racketeering, argued that the Gov-

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[75] *Id.* at 2502.

[76] *Id.* at 2505.

[77] *Id.*

[78] *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause. . .") (citations omitted).

[79] 481 U.S. 739 (1987).

[80] 18 U.S.C. § 3141 (permitting pre-trial detention of an arrestee if he or she is deemed dangerous to the community).

[81] *Id.* Before issuing the detention, the government must prove by clear and convincing evidence that such is necessary in order to ensure the safety of the community. *Salerno,* 481 U.S. at 741.

ernment violated their substantive due process rights by detaining them prior to judgment in a criminal trial.[82]

The Court, in an opinion issued by Chief Justice Rehnquist, found that the Government's interest in preventing crime was compelling and that the gravity of this interest is further amplified when it can present clear and convincing evidence that the individual awaiting trial is dangerous to the community.[83] The Court opined that this compelling interest, combined with the numerous procedural safeguards surrounding the pre-trial detentions, was sufficient for the Bail Reform Act to be consistent with the Due Process Clause.[84]

The boundaries of detention as they pertain to individuals within the criminal process have been further defined by the Court in *Kansas v. Hendricks*.[85] Unlike the detention at issue in *Salerno*, however, the detention scheme in *Hendricks* was "civil in nature" and followed completion of one's term of imprisonment for a crime.[86] The confinement at issue was that required by the Kansas Sexually

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[82] *Id.* at 744. The respondents also contended that the legislation violated the bail clause of the Eighth Amendment but that issue need not be addressed for purposes of this analysis. *Id.* at 745.

[83] *Id.* at 750.

[84] *Id.* at 752. The procedural safeguards that attached to pre-trial detention under the Bail Reform Act include:

> Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors. . .The government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of fact and a written statement of reasons for the detention. The Act's review provisions provide for immediate appellate review of the detention decision.

Id. at 751-52 (citations omitted).

Cf., Jackson v. Indiana, 406 U.S. 715, 738 (1972) (striking down the pre-trial detention of individuals whose capacity to stand trial was in question and explaining that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed" and concluding that the Indiana statute at issue did not meet such a standard); *but cf.*, *Foucha*, 504 U.S. at 81-83 (distinguishing the Louisiana law at issue from *Salerno* because the law being challenged required indefinite detention of individuals who had the burden of proving that they were *not* dangerous to the community).

[85] 521 U.S. 346 (1997).

[86] *Id.* at 369.

Violent Predator Act.[87] Under the Act, any individual who was determined to have a "mental abnormality" or a "personality disorder" that would make them likely to engage in sexually criminal behavior, could be civilly committed for an indefinite duration.[88] Hendricks, who was to be released from prison shortly after this Act became law, brought suit alleging that the confinement required by the Kansas statute violated his constitutional rights including his rights to substantive due process.[89]

Justice Thomas, writing for the majority, explained that detention is not always synonymous with punishment particularly when the goal of the detention is to allow the confined individual an opportunity to recover from a mental abnormality.[90] The majority asserted that the freedom from physical restraint is not one that is absolute.[91] Therefore, like in *Salerno*, the Court was not prepared to prohibit the Government from detaining individuals whom it found to be dangerous in the name of Due Process or liberty interests.[92] However, the Court was more restrictive than it had been in *Salerno* and explained that more than a showing of dangerousness is required in situations of involuntary confinement that are imposed pursuant to civil commitment statutes.[93] The Court maintained that such provisions are only held valid if there is also a showing of "some additional factor, such as 'mental illness' or 'mental abnormality'."[94] The Court found that the Kansas statute at issue clearly fell within the rubric of other civil confinement statutes that had previously been sustained and, thereby, upheld Hendricks' confinement order.[95]

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[87] *Id.*; KAN. STAT. ANN. § 59-29a01 (2000).

[88] *Hendricks*, 521 U.S. at 350.

[89] *Id.* Hendricks also argued that the statute posed both double jeopardy and *ex post facto* problems. *Id.*

[90] *Id.* at 363.

[91] *Id.* at 356.

[92] *Id.* at 357.

[93] *Id.* at 358.

[94] *Hendricks*, 521 U.S. at 358 (citations omitted).

[95] *Id.* at 357-60.

B. THE DUE PROCESS IMPLICATIONS OF DETAINING AN ALIEN

The general questions surrounding involuntary detention of individuals have played out in various fashions in the immigration context. Such is true for both aliens who are already in the country as well as those who are seeking entry. The questions surrounding the extent of an alien's Due Process rights in potential detention situations have been analyzed for over a century.[96]

The detention of aliens pending deportation was an issue analyzed by the United States Supreme Court as early as 1896 in *Wong Wing v. United States*.[97] The petitioners in *Wong Wing* were individuals charged with being in the United States unlawfully, were ordered removed and, pending removal, were subject to a sixty-day detention at hard labor without a hearing.[98] The Chinese individuals argued that this requirement violated their liberty interests as guaranteed by the Constitution.[99]

With respect to constitutional mandates, the Court found a distinction between the requirement of detention and that of hard labor.[100] Justice Shiras, writing for the majority, noted that detention had consistently been sustained under the constitutional mandates of liberty.[101] However, legislation that subjected aliens to imprisonment at hard labor had to "provide for a judicial trial to estab-

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[96] *See, e.g.*, United States v. Witkovich, 353 U.S. 194 (1957); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); Wong Wing v. United States, 163 U.S. 228 (1896).

[97] 163 U.S. 228 (1896).

[98] *Id.* at 239 (Field, J., concurring in part, dissenting in part).

[99] *Wong Wing*, 163 U.S. at 237.

[100] *Id.* at 236. The Court explained:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in the legal sense.

Id. at 235.

[101] *Id.* at 237.

lish the guilt of the accused."[102] The Court further clarified that the Constitutional protections under the Fourteenth Amendment are not exclusively for citizens but rather "'all *persons* within the territory of the United States.'"[103]

In 1953, the Court was once again confronted with the issue of the constitutional questions surrounding the detention of aliens in *Shaughnessy v. Mezei.*[104] In *Mezei,* the respondent, an alien resident of the United States who had lived there for approximately 25 years, traveled to Hungary where he remained for 19 months.[105] Upon returning to the United States he was informed that he would be subject to a temporary exclusion, during which he was to remain on Ellis Island.[106] Without dispensation of a hearing, his temporary exclusion was made permanent on the basis of confidential evidence.[107] The permanent exclusion, however, was ineffective because the State Department could not successfully obtain entry for Mezei to any other country.[108] The Court visited the issue after the District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit agreed that Mezei's liberty interests were violated by a detention with no foreseeable end.[109]

Justice Clark, who delivered the opinion of the Court, agreed that there are some constitutional rights to be afforded an alien lawful resident.[110] However, in the Court's opinion, Mezei, regardless of his twenty-five year residence, did not

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[102] *Id.*

[103] *Id.* at 238 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)); *but see*, Landon v. Plasencia, 459 U.S. 21, 32-34 (1982) (noting that although it is true that the Fourteenth Amendment protects all persons within the U.S. borders, the extent of that protection could vary according to the status of the person in question) (emphasis added).

[104] 345 U.S. 206 (1953).

[105] *Id.* at 208. The facts indicated that Mezei ended up in Hungary because Rumania, the country he wished to reach in order to visit his dying mother, denied him entry. *Id.*

[106] *Id.*

[107] *Id.* Mezei was told nothing more than that confidential information revealed that his entry posed a threat to national security. *Id.*

[108] *Id.* Among the attempts made were readmission to Hungary as well as entry to numerous Latin American countries. *Id.* at 209.

[109] *Id.*

[110] *Mezei,* 345 U.S. at 214.

fall into the category of a lawful resident.[111] The Court posited that Mezei's absence from the United States was extensive and was compounded by the fact that he "remained behind the Iron Curtain."[112] In the Court's opinion, the facts surrounding Mezei's travels abroad made him more akin to an alien attempting entry for the first time rather than a lawful resident merely seeking re-entry.[113] In this way, the Court was willing to defer to the Attorney General's finding that Mezei was a threat to security warranting exclusion without a hearing or disclosure of evidence.[114] Anchoring much of the justification on the fact that Mezei's exclusion was due to concerns of national security, Justice Clark did not find his indefinite detention on Ellis Island to be a deprivation of statutory or constitutional rights.[115]

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[111] *Id.*

[112] *Id.* The Court used a case decided almost immediately before *Mezei* as a source of comparison, *Kwong Hai Chew v. Colding,* 344 U.S. 590 (1953). In *Chew,* the alien, like Mezei, was excluded upon re-entry without a hearing on security grounds. *Chew*, 344 U.S. at 590. However, the Court found it distinguishable that Chew remained out of the United States for only four months and that during his absence he was aboard an American ship. *Mezei*, 345 U.S. at 214-15.

[113] *Mezei,* 345 U.S. at 214.

[114] *Id.*

[115] *Id.* at 215-16. Justice Jackson, in dissent, greatly disagreed with the Court regarding the lack of constitutional deprivation arguing:

> Here we have a case that lies between the taking of life and the taking of property; it is the taking of liberty. . .[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them.

Id. at 227 (Jackson, J., dissenting).

Mezei's detention received much public attention as he remained on Ellis Island for four years until he was paroled into the United States. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 964-84 (1995) (providing an excellent account of the life and struggles of Ignatz Mezei).

IV. *ZADVYDAS*: PROTECTING THE LIBERTY INTERESTS OF LAWFUL RESIDENT ALIENS: REMOVABLE ALIENS MAY NOT BE DETAINED INDEFINITELY

The United States Supreme Court granted certiorari to decide the split among the circuits over the constitutionality of the indefinite detention of aliens who are awaiting deportation.[116]

A. JUSTICE BREYER'S MAJORITY OPINION

Justice Breyer authored a 5-4 majority that began with a review of the post-removal-period statute at issue as well as the statutory factors that encompass a decision to either release or further detain an alien who is awaiting removal.[117] Following a brief recitation of the facts and procedural history that lead to the consolidation of the cases at issue, Justice Breyer affirmed that the federal court's jurisdiction to deal with habeas corpus petitions had been authorized by statute and such petitions are available as a tool for those who have potentially been unlawfully imprisoned to challenge the constitutionality of their detention.[118] Exploring the statutory language of the post-removal-detention statute and how such statutory interpretation has been addressed by the Court in situations of imprisonment, the Court found no reason to believe that Congress' intent required aliens awaiting removal to be indefinitely detained or that it was constitutionally permissible.[119] In so finding, Justice Breyer set the standard for a reasonable detention period of six months, after which time the Government may only continue to detain the removable alien if it can prove that removal will take place "in the reasonably foreseeable future."[120]

The Post-Removal Period Detention Statute and Habeas Corpus Review

Justice Breyer began the majority opinion with an explanation of the intrica-

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[116] Zadvydas v. Davis, 121 S. Ct. 2491, 2495 (2001).

[117] *Id.* Justices Stevens, O'Connor, Souter and Ginsburg joined the majority opinion. *Id.* at 2493. The post-removal period detention statute at issue can be found at 8 U.S.C. § 1231(a)(6) (2001) and is explained further by the Immigration Regulations at 8 CFR § 241.4 (2001).

[118] *Zadvydas*, 121 S. Ct. at 2495-98.

[119] *Id.* at 2498-505.

[120] *Id.* at 2505.

cies of how removal proceedings work, in what situations detention is permitted and how the post-removal period detention statute is applied.[121] The Justice explained that during the removal period, which is statutorily set at ninety days, the Government must hold the alien in custody.[122] Once the ninety days have passed and removal has not been achieved, however, the Government "may" continue the detention or may release the alien under specific guidelines of supervision using the procedures dictated by the immigration regulations to aid in the determination.[123]

After reviewing the issues surrounding both Zadvydas' and Ma's petitions for habeas corpus that warranted consolidation of the cases, Justice Breyer explained the origin of the federal courts' jurisdiction to hear habeas corpus petitions as they relate to the deportation of aliens.[124] Justice Breyer concluded that the fed-

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[121] *Id.* at 2494-95. "An alien ordered removed. . .*may* be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision. . ." *Id.* at 2495. (quoting 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)).

[122] *Id.* at 2495 (citing 8 U.S.C. § 1231(a)(2) (1994 ed., Supp. V). The statute states that when an alien is ordered removed, the removal shall take place within a period of 90 days and that this period is referred to as the "removal period." 8 U.S.C. § 1231(a)(1)(A) (2001).

[123] *Zadvydas*, 121 S. Ct. at 2495 (citing 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V.)). Justice Breyer explained the procedure with which the INS determines whether to further detain or to release:

> [T]he INS District Director will initially review the alien's records to decide whether further detention or release under supervision is warranted. . . .If the decision is to detain, then an INS panel will review the matter further, at the expiration of a 3-month period or soon thereafter. And the panel will decide. . .between still further detention or release under supervision. . . .To authorize the release, the panel must find that the alien is not likely to be violent, to pose a threat to the community, to flee if released, or to violate the conditions of release. And the alien must demonstrate 'to the satisfaction of the Attorney General' that he will pose no danger or risk of flight. If the panel decides against release, it must review the matter again within a year, and can review it earlier if conditions change.

Id. (citing 8 C.F.R. §§ 241.4(c)(1), (e), (h), (k)(1)(i), (k)(2)(ii), (k)(2)(iii), (k)(2)(v) (2001)) (citations omitted).

[124] *Zadvydas*, 121 S. Ct. at 2497-98. Justice Breyer embarked on a brief historical pronouncement of the history of federal court review of deportation proceedings and of recently enacted statutory provisions limiting judicial review of deportation decisions. *Id.* The Justice explained, however, that those provisions are inapplicable in the case at bar because they limit review of challenges to the Attorney General's discretion, rather than the Attorney General's authority under the post-removal-period detention statute which is what is challenged here. *Id.* (citations omitted).

eral courts properly exist as a "forum for statutory and constitutional challenges to post-removal-period detention."[125]

"A Serious Constitutional Problem"

Having laid the foundation of the Court's authority to review the detentions at issue, Justice Breyer addressed the merits of the claims.[126] The Government encouraged the Court to engage in a literal reading of the post-removal-detention statute which would potentially allow for indefinite detention because Congress did not specify how long after the completion of the removal period an alien may be detained and, thus, left the length of time for the Attorney General to determine.[127] Justice Breyer, however, disagreed with this argument and noted that the Court, in interpreting a statute, is obligated to read terms, conditions or limitations into a statute if necessary to prevent it from being constitutionally invalid.[128] Therefore, Justice Breyer read into the post-removal period detention statute the limitation that such detention can only extend for a "period reasonably necessary" thereby disallowing indefinite detention.[129] In the Court's opinion, "[a] statute permitting indefinite detention of an alien would raise a *serious constitutional problem.*"[130]

Justice Breyer next addressed the constitutional holes that existed in the Government's interpretation of the post-removal-detention statute when analyzed under the requirements of the Fifth Amendment's Due Process Clause.[131] Noting that immigration proceedings are criminal and not civil, Justice Breyer explained that it is a well-settled principle that government detention contravenes the Due

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[125] *Id.* at 2498. The habeas corpus statute that grants the federal courts jurisdiction to hear immigration cases dealing with post-removal-detention provides that: "[t]he writ of habeas corpus shall not extend to a prisoner unless. . .(3) [h]e is in custody in violation of the Constitution or laws or treatises of the United States. . ." 28 U.S.C. § 2241(c)(3) (2001).

[126] *Zadvydas*, 121 S. Ct. at 2498.

[127] *Id.* (citing 8 U.S.C. § 1231(a)(6)).

[128] *Id.* The Court noted that: "'[i]t is a cardinal principle' of statutory interpretation, however, that when 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.'" *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[129] *Id.* at 2498.

[130] *Zadvydas*, 121 S. Ct. at 2498.(emphasis added)

[131] *Id.*

Process Clause unless it is in connection with criminal proceedings that, by their nature, attach certain procedural safeguards.[132] Justice Breyer pointed out that government-inflicted detention is only justified in circumstances where the purpose is non-punitive and there exists a "special justification."[133] Justice Breyer indicated that these requirements were not met here.[134]

The Government argued that the two "regulatory goals" of the post-removal-detention statute were [1] to prevent aliens from fleeing while their proceedings are pending and [2] to protect the community.[135] Justice Breyer characterized the first goal as "weak or nonexistent" in cases such as these where removal seems impossible.[136] Justice Breyer acknowledged the second goal has been accepted as warranting detention in non-punitive situations, but found such situations distinguishable from that in *Zadvydas* and noted that the dangerousness the second goal sought to alleviate must necessarily be accompanied by "some other special circumstance, such as mental illness, that helps to create the danger."[137] Thus, according to Justice Breyer, the justifications the Government provided for detention under the post-removal-detention statute did not fall within this specialized category.[138]

Justice Breyer next addressed the lack of limitations and procedural safeguards in the post-removal-detention statute that would have to be present to justify potentially permanent civil confinement.[139] Such safeguards are particularly

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[132] *Id.* at 2498-99 (citing United States v. Salerno, 481 U.S. 739, 746 (1987)).

[133] *Id.* at 2499 (citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (finding Government detention of an individual who was mentally ill and potentially harmful to be appropriate even though the individual had already completed the detention required by his criminal conviction)).

[134] *Id.*

[135] *Zadvydas,* 121 S. Ct. at 2499.

[136] *Id.* ("[B]y definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best. [T]his Court [has] said where detention's goal is no longer practically attainable, detention no longer 'bears [a] reasonable relation to the purpose for which the individual [was] committed.'" (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

[137] *Id.* (citing *Hendricks*, 521 U.S. at 358, 368 (where the detention scheme was upheld because it was imposed upon "a small segment of particularly dangerous individuals")).

[138] *Id.*

[139] *Id.*

important, argued Justice Breyer, in situations such as those where the detention is applied "broadly to aliens ordered removed for many and various reasons. . . ."[140] The majority opinion then expressly provided "suspected terrorists" as an example of a group of aliens to which this statute may be appropriate.[141]

Justice Breyer explained that the statute's constitutional infirmities were amplified by virtue of the fact that the only procedural protections an alien subject to this statute was granted were those derived from administrative proceedings, during which the alien maintains the burden of proving that he or she is not dangerous to the community.[142] The Justice suggested that administrative proceedings do not provide the review that is needed when one's individual liberties and fundamental rights are at stake.[143] Justice Breyer opined that "[t]he serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious."[144]

The Implications of One's Status on One's Liberty Interests

The majority explained that the Government rested much of its justification for the indefinite detention on the fact that the individuals being confined were of alien status and pointed to *Shaughnessy v. Mezei*[145] as support for that assertion.[146] Justice Breyer, however, characterized the difference between *Mezei* and *Zadvydas* as "critical."[147] The majority explained that the Court had consistently

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[140] *Id.*

[141] *Zadvydas*, 121 S. Ct. at 2499; *see also infra* Part V.

[142] *Zadvydas*, 121 S. Ct. at 2499-500 (citing 8 C.F.R. § 241.4(d)(1) (2001) which provides that: "[t]he district director or the Executive Associate Commissioner may release an alien *if the alien demonstrates* to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States." (emphasis added)).

[143] *Id.* at 2500.

[144] *Id.*

[145] 345 U.S. 206 (1953).

[146] *Zadvydas*, 121 S. Ct. at 2500.

[147] *Id.* In *Mezei*, the alien was a lawful resident of the United States but left the country for an extended period of time and was detained indefinitely following his attempt to reenter. *See supra* Part III.

found a clear distinction between the constitutional protections afforded to an alien who was within the United States and one who was still attempting to enter its borders.[148] The Court explained that "[i]t is well-established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[149] Justice Breyer emphasized that this difference is critical since "the Due Process Clause applies to all 'persons' *within* the United States, including aliens, whether their presence is lawful, unlawful, temporary or permanent."[150]

The Government's Plenary Power to Create Immigration Law

In addition to the argument that alien status warrants less constitutional protections, the Government also alleged that precedent had established its power as plenary in the area of immigration law and, therefore, the judicial branch must give deference to the Government's decisions in this area.[151] Justice Breyer countered this argument by noting that such "power is subject to important constitutional limitations."[152] The majority maintained that its purpose was not to deny Congress the right to implement the procedures that accompany removal, detention and release, but rather to address the constitutional protections that must be afforded when they are not provided for by statute.[153] In fact, the Court explicitly acknowledged that in reviewing these habeas corpus petitions it did not intend to speak to "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."[154] While acknowledging that foreign policy is a legitimate

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[148] *Zadvydas*, 121 S. Ct. at 2500 (citations omitted).

[149] *Id.* (citations omitted).

[150] *Id.* (emphasis added). The Government also argued that the aliens in this case should not be released because they did not have a legal right to "'live at large in this country.'" *Id.* at 2502 (citations omitted). However, the majority disagreed with this assessment noting that if post-removal aliens were released they would be under intense supervision. *Id.*

[151] *Id.* at 2501.

[152] *Id.* (citing INS v. Chadha, 462 U.S. 919, 941-42 (1983)).

[153] *Zadvydas*, 121 S. Ct. at 2501-02.

[154] *Id.* at 2502; *see also infra* Part V (noting that the effects of *Zadvydas* may never be felt because of the grave issues of national security that have arisen since the events in the United States on September 11, 2001).

concern of the Government, Justice Breyer found that the only specific foreign policy issue remotely associated to this case was that surrounding potential repatriation negotiations and noted that this situation was not affected by the Court's review of this matter.[155]

Statutory Construction

Acknowledging that an alien's liberty interest warranted inquiry into whether indefinite and potentially permanent confinement was constitutionally permissible, Justice Breyer noted that such detention was possibly beyond the Court's reach if Congress clearly intended to permit it.[156] The majority did not find such an intent, stating instead "[w]e cannot find here, however, any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."[157] The Government encouraged the Court to interpret the word "may" in the post-removal-detention statute as granting the Attorney General full discretion to hold an alien beyond the removal period, but the majority refused.[158] The Court read the word "may" as making the statute ambiguous, particularly in light of the fact that there were provisions within the statute that addressed removal where Congress explicitly permitted the continued detention of terrorist aliens.[159] The majority indicated that the post-removal period detention statute was infirm because it extended beyond criminals and terrorists and included all aliens.[160]

Proper Review by the Courts Under Habeas Corpus

Justice Breyer next addressed the Government's argument that, even in construing the statute as the Court preferred, it was not within the authority of fed-

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[155] *Zadvydas*, 121 S. Ct. at 2502.

[156] *Id.*

[157] *Id.*

[158] *Id.*; *see* 8 U.S.C. § 1231(a)(6) (2001).

[159] *Zadvydas*, 121 S. Ct. at 2502-03 (citing 8 U.S.C. § 1537(b)(2)(C) (1994 ed., Supp. V.) (allowing the Attorney General to continue to retain a terrorist alien whom other countries refuse to accept provided the detention determination is reviewed every six months)).

[160] *Id.* at 2503. The Government also argued that the statutory history of provisions concerning removal and detention proved the post-removal-detention statute valid. *Id.* However, the majority "found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." *Id.*

eral courts under habeas corpus review to determine what length of detention would be reasonable.[161] The majority disagreed with this assertion and noted that it was part of the basic habeas corpus review authority to determine whether the detention was unreasonable and, therefore, in violation of United States laws.[162]

The majority articulated that the proper standard by which to determine the validity of the post-detention period removal statute was "whether the detention in question exceeds a period reasonably necessary to secure removal."[163] Under this standard, if the removal is not reasonably foreseeable, courts should deem the detention outside of statutory authority and order that the alien be released.[164]

Justice Breyer maintained that by reading into the statute a reasonable period of detention, the majority was, in effect, decreasing the number of instances in which the courts must interject judicial judgments into those made by the Executive and Legislative branches concerning issues of foreign policy and relationships.[165] The majority recognized a period of six months following the removal period as a "reasonable" amount of time to detain an alien that had not been successfully deported.[166] The Court determined that after six months, an alien may create a rebuttable presumption that removal will not take place in the "reasonably foreseeable future."[167] If the Government cannot present evidence to rebut this presumption, the alien can no longer be confined.[168] Justice Breyer instructed both the Fifth and Ninth Circuits to reevaluate the circumstances of both Zadvydas and Ma in a fashion that was consistent with this standard and vacated both Circuit Court decisions.[169]

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[161] *Id.*

[162] *Id.* at 2504.

[163] *Id.* at 2504. The majority further explained that reasonableness should be measured in light of the statute's basic purpose. *Id.*

[164] *Id.*

[165] *Zadvydas*, 121 S. Ct. at 2504.

[166] *Id.* at 2505.

[167] *Id.*

[168] *Id.* The majority clarified that the "6-month presumption. . .does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

[169] *Id.* Justice Breyer took issue with the foundation on which both the Fifth and Ninth

B. JUSTICE SCALIA'S DISSENT

Justice Scalia, joined by Justice Thomas, dissented from the majority's opinion.[170] Justice Scalia wrote separately from a dissent by Justice Kennedy to emphasize that there are no situations in which a court is authorized to order that an alien be released.[171] Justice Scalia posited that the petitioners were claiming a constitutional right that was non-existent for them because "freedom from 'physical restraint' or freedom from 'indefinite detention'. . .is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here."[172]

The Justice maintained that the case at bar was indistinguishable from that in *Mezei* where the Court found that Mezei did not have a "substantive constitutional right" warranting that he be released back into the United States.[173] Justice Scalia explained that the majority was incorrect in drawing a distinction between the constitutional rights of an alien who is attempting to enter the United States and those of an alien who is within its borders.[174] In addition, Justice Scalia criticized the majority for failing to properly support this attempted distinction.[175] Therefore, Justice Scalia concluded that *Mezei* should have con-

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Circuits rested their decisions even though they arrived at conflicting conclusions regarding the validity of indefinite detention. *Id.* The Justice noted that the Fifth Circuit was incorrect in upholding the detention merely because Zadvydas could not prove that removal was "impossible." *Id.* Likewise, the Ninth Circuit was incorrect in effectuating Ma's release "solely" because there was currently no repatriation agreement with Cambodia. *Id.*

[170] *Id.* at 2505 (Scalia, J., dissenting). Justice Scalia concurred with the portion of Justice Kennedy's dissent that found the Attorney General to be clearly authorized to detain criminal aliens indefinitely. *Id.*; *see also infra* Part IV, C ("Justice Kennedy's Dissent").

[171] *Zadvydas,* 121 S. Ct. at 2505 (Scalia, J., dissenting).

[172] *Id.* (emphasis in original)

[173] *Id.* at 2506 (Scalia, J., dissenting). Justice Scalia indicated that the Court managed to "obscure [*Mezei*] in a legal fog." *Id.* Justice Scalia also took issue with the majority's use of *Wong Wing v. United States*, 163 U.S. 228 (1896). In Justice Scalia's opinion, *Wong Wing* only stood for the proposition that aliens who are detained cannot be subjected to hard labor, not whether or not such aliens have a right to release if their removal is not effectuated. *Zadvydas,* 121 S. Ct. at 2506 (Scalia, J., dissenting).

[174] *Id.*

[175] *Id.* The Justice attached much credence to the fact that Congress addressed both "inadmissible aliens at the threshold and criminal aliens under final order of removal" in the same statutory opinion and deemed this support for the notion that the two groups are not to be given differing constitutional protections. *Id.* (citing 8 U.S.C. § 1231(a)(6)).

trolled the issues at bar and, in this way, found it within the purview of the Attorney General's authority to determine when detention and release were appropriate.[176]

C. JUSTICE KENNEDY'S DISSENT

Constitutional Avoidance?

Justice Kennedy wrote a separate dissent which Chief Justice Rehnquist joined in full and Justices Scalia and Thomas joined as to Part I.[177] The first part of Justice Kennedy's dissent focused on critiquing the Court's supposed attempt at avoiding a constitutional question and its misinterpretation of the statute at issue.[178]

The Justice deemed the action taken by the majority in inserting the six-month limitation on detention as one that overstepped the boundaries of judicial authority while creating a serious risk for the community.[179] In Justice Kennedy's opinion, the majority "reached the wrong result for the wrong reason. . . ."[180] According to Justice Kennedy, the majority purported to read a term into the statute in order to avoid having to find it completely unconstitutional, but inferred in a term that was completely inconsistent with Congress' intent and with the other provisions that encompass the Immigration Nationality Act.[181] The Justice explained that, while failing to fully address what ambiguities warranted the majority's decision to effectively amend the statute, Justice Breyer also failed to acknowledge the fact that the circumstances at issue were within the purview of the Attorney General's decision-making authority.[182]

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[176] *Zadvydas*, 121 S. Ct. at 2507 (Scalia, J., dissenting). Justice Scalia agreed with Justice Kennedy's reading of the post-removal-detention statute for its plain meaning. *Id.*

[177] *Id.* at 2507 (Kennedy, J., dissenting).

[178] *Id.* at 2507-13 (Kennedy, J., dissenting).

[179] *Id.* at 2507 (Kennedy, J., dissenting).

[180] *Id.*

[181] *Id.* Justice Kennedy maintained that "[t]he majority gives a brief bow to the rule that courts must respect the intention of Congress but then waltzes away from any analysis of the language, structure or purpose of the statute." *Id.* at 2508 (Kennedy, J., dissenting).

[182] *Zadydas*, 121 S. Ct. at 2508 (Kennedy, J., dissenting).

Justice Kennedy asserted that the majority misinterpreted Congress' intent, and noted the fact that there are provisions in § 1231 where Congress expressly imposed a requirement of reasonableness in certain instances of removal while omitting such a limitation in the post-removal period detention statute.[183] The Justice explained that Congress' decision "to impose the limitation in these sections and not in § 1231(a)(6) is evidence of its intent to measure the detention period by another standard."[184] Justice Kennedy maintained that developing a six-month standard under the guise of reasonableness will serve to release too broad a group of aliens and will, therefore, nullify the Government's goal of protecting the community.[185]

Justice Kennedy expressed great concern to what, in the view of these dissenting Justices, was the equivalent of a complete overreaching of the judiciary's authoritative boundaries into the discretion of immigration law that both the Legislative and Executive branches properly delegated to the Attorney General.[186] The Justice feared that the majority's mandated removal period would have extreme and potentially dangerous ramifications on the country when foreign nations refused to accept aliens back into their countries because they are confident

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[183] *Id.* (citing 8 U.S.C. §§ 1231(c)(1)(A), (c)(3)(A)(ii)(II)). § 1231(c)(1) provides for the removal of aliens arriving at a port of entry into the United States on a vessel or aircraft and reads: "An alien arriving at a port of entry of the United States who is ordered removed. . .shall be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States unless—it is impracticable to remove the alien on one of those vessels or aircraft within a *reasonable time.*" 8 U.S.C. § 1231(c)(1)(A) (2001) (emphasis added).

§ 1231(c)(3)(A)(ii)(II) provides for who is to bear the cost of detaining and maintaining aliens that arrive at a port of entry and are awaiting removal. This provision provides that "[i]n general. . .an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien—in the case of an alien who is a stowaway, while the alien is being detained. . *.for the period of time reasonably necessary* for the owner to arrange for repatriation or removal of the stowaway. . . ." 8 U.S.C. § 1231(c)(3)(A)(ii)(II) (2001) (emphasis added).

[184] *Zadvydas,* 121 S. Ct. at 2508 (Kennedy, J., dissenting).

[185] *Id.* Justice Kennedy indicated that the characteristics which made the alien removable in the first instance did not disappear simply because the alien's detention had been extensive. *Id.* at 2509 (Kennedy, J., dissenting).

[186] *Id.* at 2509-10 (Kennedy, J., dissenting). According to Justice Kennedy, the Court's interpretation of the statute served to confer discretion upon the Attorney General in some instances of detention and removal while inconsistently removing this same discretion in other instances. *Id.*

that these dangerous aliens would shortly be released within our borders.[187]

Aliens' Lack of Liberty Interests

For Justice Kennedy, the root of the majority's misperceptions was its refusal to acknowledge that aliens do not share the liberty interests of United States citizens.[188] The Justice expounded that it is a well-established principle that the liberty interests of aliens are limited and that the extensive procedures that encompass determining whether an alien is removable protect these limited interests.[189] Justice Kennedy defined aliens' status, not by the length of time they were in the United States nor by the fact that they were in the United States legally, but rather, by the fact that they were deemed removable.[190] The Justice stated that "the removal orders reflect the determination that the aliens' ties to this community are insufficient to justify their continued presence in the United States [especially since,] [a]n alien's admission to this country is conditioned upon compliance with our laws."[191] While acknowledging that detention of aliens pending

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[187] *Id.* at 2510 (Kennedy, J., dissenting); *see also infra* Part V. Justice Kennedy argued: "The interference with sensitive foreign relations becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us." *Id.* at 2510.

Justice Kennedy also explained that aliens who are not in this country legally will be rewarded as well: "Today's result may well mandate the release of those aliens who first gained entry illegally or by fraud, and, indeed, is broad enough to require even that inadmissible and excludable aliens detained at the border be set free in our community." *Id.* at 2512-13 (Kennedy, J., dissenting). To expand on this point, the Justice provided the example of a Cuban citizen who arrived in this country and, while in the middle of a sentence for burglary and grand larceny, he escaped and committed additional crimes. *Id.* at 2513 (Kennedy, J., dissenting). This alien was ordered deported and was detained but the Sixth Circuit mandated that he be released because the indefinite detention that was possible, because of the unlikelihood that Cuba would accept him, violated his Fifth Amendment due process rights. *Id.* Justice Kennedy found that this situation, one in which an alien who has a criminal history and has repeatedly attempted to flee, will be one that the majority's opinion will foster. *Id.* (citing Rosales-Garcia v. Holland, 238 F.3d 704 (6th Cir. 2001)).

[188] *Zadvydas*, 121 S. Ct. at 2513 (Kennedy, J., dissenting).

[189] *Id.* at 2514 (Kennedy, J., dissenting). One should note that, unlike Justice Scalia, Justice Kennedy found it "not necessary to rely upon *Mezei*." *Id.*

[190] *Id.* at 2514-15 (Kennedy, J., dissenting).

[191] *Id.* at 2515 (Kennedy, J., dissenting).

deportation would violate their rights if intended to punish, Justice Kennedy noted that it is more than proper to confine aliens when the purpose is to protect the community and prevent flight as purported by the Government in this case.[192]

Justice Kennedy maintained that the due process right that is potentially implicated for aliens ordered removed is not the "substantive right to be free" but is instead the right to have "adequate procedures to review their cases."[193] This right is protected, according to the Justice, by the expansive regulations provided for by the INS in making the determination of whether an alien should be detained as well as the periodic reviews to judge the validity and necessity of continued detention.[194] Justice Kennedy also noted that "although the alien carries the burden to prove detention is no longer justified, there is no showing that this is an unreasonable burden."[195] Since neither of the aliens in *Zadvydas* argued that the procedures determining their detention were conducted in an erratic fashion, their liberty interests were not infringed upon.[196] Therefore, the dissent posited that because judicial review in which the majority engaged was inappropriate, the decision of the Ninth Circuit should have been reversed, refusing to release Ma, and the decision of the Fifth Circuit should have been affirmed, upholding the detention of Zadvydas.[197]

V. CONCLUSION

Oftentimes, the proclamations of the Supreme Court have earthshaking ramifications on policy and procedures that can be felt throughout the Government and the country. However, *Zadvydas* was closely followed by another earthshaking event in our country that has the potential to blur the goals of the majority before they are even put into effect—this event being the tragedies on September 11, 2001.[198] What comes of a nation subject to such acts of terror? What

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[192] *Id.*

[193] *Id.*

[194] *Zadvydas*, 121 S. Ct. at 2515-16 (Kennedy, J., dissenting) (citations omitted).

[195] *Id.* at 2517 (Kennedy, J., dissenting).

[196] *Id.*

[197] *Id.*

[198] One need not summarize the events that took place in the United States on September 11, 2001; however, for purposes of thoroughness, such a recitation is provided.

> At 8:45 [a.m.], David Blackford was walking toward work in a downtown [New York City] building. He heard a jet engine and glanced up. "I saw this plane screaming overhead,' he said. 'I thought it was too low. I thought it wasn't going to clear the tower [1 World Trade Center, NY, NY].". . . Within moments. . .[t]he plane slammed into the north face of 1 World Trade Center. . . . Within about fifteen minutes of the first crash, [a] second plane struck the neighboring tower [2 World Trade Center, NY, NY]. . . .
>
> And then it got even worse.
>
> Abruptly, there was an ear-splitting noise. The south tower shook, seemed to list in one direction and them [sic] began to come down, imploding upon itself. . . .
>
> Many of the onlookers stayed put, frozen in horror. Slowly, the next thought crept into their consciousness: The other tower would come down too. . . .
>
> [T]he premonition became reality—another horrifying eruption, as one floor after another seemed to detonate.

N.R. Kleinfeld, *A Creeping Horror: Buildings Burn and Fall As Onlookers Search for Elusive Safety*, N.Y. TIMES, Sept. 12, 2001, at A1, A7.

Similarly in Washington D.C.:

> American Airlines Flight 77, a Boeing 757 carrying 58 passengers and six crew members, was on a scheduled flight from Dulles International Airport west of Washington [D.C.] to Los Angeles when it was diverted and slammed into the [Pentagon] at about 9:30 a.m., when Pentagon workers are well into their workday.

Don Van Natta and Lizette Alvarez, *A Hijacked Boeing 757 Slams Into the Pentagon, Halting the Government*, N.Y. TIMES, Sept. 12, 2001, at A5.

The fourth hijacked plane crashed in Pennsylvania:

> The crash came minutes after a passenger reportedly called an emergency dispatcher from his cell phone and said that the plane had been hijacked and was "going down."
>
> The plane nose-dived into the field, the authorities and two witnesses said, killing all 45 people on board. The plane carved a crater 8 to 10 feet deep, burned a path through the trees beyond the field and scattered thousands of pieces of debris, law enforcement officials said.

comes of the liberties we feel "they" stole from American citizens and those who may not have citizen status but have felt safe and free in the United States? Who is this anomalous group that Americans should and are holding responsible for taking for granted and diminishing their liberties? Terrorists? Foreign nations with which the United States has strained relations? All immigrants? This definition of "they" varies throughout races, classes and cultures as well as among American citizens and those who may not technically have citizen status but have, nonetheless, come to call the United States their home.

In *Zadvydas v. Davis*, Justice Breyer specified that the majority was not speaking to situations when national security was an important factor to consider or when suspected terrorists were the aliens being subject to detention.[199] The majority, in essence, carved out terrorists as a group to which the *Zadvydas* decision, and any protections it afforded, did not extend.[200] President George W. Bush's "War on Terrorism," therefore, would technically have little effect on the force of the *Zadvydas* decision.[201]

What happens, then, when our fears blur our vision to the point that every immigrant that originates from a certain country or looks a certain way falls into the ever-broadening category of "suspected terrorists?"[202] Is the Government

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Jere Longman and Sara Rimer, *Passenger Reported Hijacking Shortly Before a Crash*, N.Y. TIMES, Sept. 12, 2001, at A16.

[199] *Zadvydas*, 121 S. Ct. at 2499.

[200] *Id.*

[201] Many have drawn a comparison with what has been deemed the newly fervent "War on Terrorism" to the imprisonment of Japanese-Americans during World War II. *E.g.*, William Glaberson, *War on Terrorism Stirs Memory of Internment*, N.Y. TIMES, September 24, 2001, at A18.

[202] The fear that has succumbed the United States has significantly affected the everyday lives of many Arab-Americans. Reactions to this fear have been reported by journalists:

> Since the Sept. 11 attacks, there has been a notable number of hate crimes against Arab-Americans and Muslims. Frightened by a wave of violence, American Sikhs are explaining to the public that despite their turbans and beards, they are not Muslims. . .[M]uslim leaders are already discussing plans for Muslim women to change the way they dress, perhaps exchanging head scarves for hats and turtlenecks. On Monday [Sept. 17, 2001], a woman trekked to the New York Health Department headquarters trying to change her son's surname from "Mohammed" to "Smith".

Gregory Rodriguez, *Aftermath: Identify Yourself: Who's American?*, N.Y. TIMES, Sept. 23, 2001, at A1, A4.

immune from having to fully protect the liberty interests Justice Breyer discussed when there is mourning and chaos at the level that struck on September 11, 2001? One critique implied that *Zadvydas*, in essence, must be set aside in times like these:

> We now live in a world, one in which the terrorist we seek is harbored by a nation under the guise of protecting his rights while we question how we opened our doors to his fanatical followers. In the face of this absurdity we cannot cling to the realities and idealism of another era. The potential effect of a porous United States immigration law, like that created in Zadvydas [sic], must be examined with scrutiny in the unfolding debate over the role immigration laws play in the [sic] protecting America from this once unimaginable terrorist threat.[203]

One becomes awe-struck to think that an era can end in just one day. After September 11, 2001, the fear that other nations would refuse to accept deportable, and potentially dangerous, nationals into their country with the expectation that our Government would not hold them beyond a "reasonable" period, expressed by Justice Kennedy, did not seem like such a remote impossibility.[204] If one reads Justice Kennedy's dissent in this fashion, it is frighteningly ironic to think that after September 11, 2001, the Government is searching out the people Justice Kennedy warned against—aliens from countries that could potentially use the fact of judicially mandated release to their advantage and "force dangerous aliens upon us."[205]

In *Zadvydas*, the majority inferred the six-month limitation on detention largely because Congress did not expressly state that it intended to permit indefinite detention.[206] Immediately after the decision came down, one columnist noted that "[t]he court [sic] decided only what Congress did do—not what it could or could not do."[207] Such a reading of the opinion results in the logical inference that detentions of indefinite durations, totally setting aside what due process implications may result, would be constitutionally sufficient if expressly provided for by Congress. This too, after September 11, 2001, may become a reality.

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[203] Michael J. Wildes, *Security Hinges On Tougher Immigration Laws*, THE RECORD (Bergen County, N.J.), Sept. 23, 2001, at 4.

[204] *Zadvydas*, 121 S. Ct. at 2510 (Kennedy, J., dissenting).

[205] *See supra* note 187 (citing *Zadvydas*, 121 S. Ct. at 2510).

[206] *Zadvydas*, 121 S. Ct. at 2498.

[207] *Some Hope For Aliens: Illegal Immigrants in United States*, 185 AM. 3 (2001).

At the time this piece is being written, Congress is considering legislation aimed at preventing future terrorist attacks; such legislation, however, also intends to drastically curb immigration and could strip many immigrants of due process protections that the United States Supreme Court has established for them. Attorney General John Ashcroft, who, in July 2001, was reported as having been unhappy with the *Zadvydas* decision,[208] was at the forefront of the battle for new legislation aimed at deterring terrorism, supporting, among other provisions, the indefinite detention of aliens with "suspected terrorist ties—without a hearing."[209]

What then is to come of the *Zadvydas* decision? Does a detained alien, who happens to be from an Arab nation, and was due released on September 12, 2001, not reap the benefits of the *Zadvydas* decision as his brother may have on September 10, 2001? Less than two months after the *Zadvydas* decision was filed, Justice Kennedy's concerns that the majority would be releasing dangerous individuals into society, regardless of why they were detained in the first instance, are coming to fruition and the United States is whole-heartedly reacting to these fears. Some legal scholars have argued that the Supreme Court, if called upon, would react in turn and "well consider parts of the World War II internment case as a precedent to restrict civil rights during wartime."[210]

The thought of internment camps is frightening. Prejudices that have taken generations to suppress and rationalize in so many Americans are now resurfacing with the only difference being the target. Allowing *Zadvydas* to be tossed aside in this time of crisis and maintaining internment camps of anyone who is feared would send a devastating message regarding precedents. This message is that maybe Supreme Court decisions are not to be relied upon for what they hold, but rather, for the exceptions they carve out like that created by Justice Breyer for the ambiguous category of "suspected terrorists."

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[208] Bruce Alpert, *La. Has Stake in Detainee Release; Many of 510 Jailed Here Could Be Freed*, THE TIMES-PICAYUNE (New Orleans), July 25, 2001, at 1.

[209] Kevin Freking and Paul Barton, *Ashcroft Bill To Fight Terrorism Draws Foes Scores of Groups See Liberties at Risk*, THE ARKANSAS DEMOCRAT-GAZETTE, Sept. 25, 2001, at A1. Numerous interest groups have expressed grave concern because of the liberty interests such legislation could implicate. *Id.; see also* Philip Shenon and Neil A. Lewis, *A Nation Challenged: Safety and Liberty; Groups Fault Plan to Listen, Search and Seize*, N.Y. TIMES, Sept. 21, 2001, at B9 (noting the wide criticism of legislation that could potentially infringe upon the liberty interests of innumerable immigrants).

[210] Glaberson, *supra* note 201.