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What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses to Say

Edward Bates Cole*

I. Introduction

It is the right of the United States, as a sovereign nation, to decide who may or may not enter its territory. In addition, this right extends to the removal of those previously admitted who have outstayed their welcome and those who entered illegally and have since been discovered. The power to remove or admit an alien from the United States lies with the Executive Branch of government. Normally, after the Executive Branch decides to remove an alien, the United States sends the excluded alien to another country. However, in a growing number of cases, no country will accept the excluded aliens. This development has left the United States with two choices: 1) detain the aliens, possibly indefinitely, until another country accepts them; or 2) release them into the United States.

When an alien comes to its border, the United States decides whether to admit the alien. If the United States excludes the alien, then the United States labels that particular alien an “excludable” or “inadmissible” alien. Once this decision is made, the excludable alien is normally “removed” to another country. Sometimes, for humanitarian reasons, these excluded aliens are

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2 Id.

3 The term “excludable” was replaced by “inadmissible” with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, INA § 235, 8 U.S.C. § 1225 [hereinafter IIRIRA]. This article uses the two interchangeably.
"paroled" into the United States under the idea of an "entry fiction." This concept allows the United States to remove the alien at any time after his or her entry into the United States without a hearing and treats the alien, for constitutional purposes, as if he or she never entered the country.

Aliens who gain legal entry into the United States or who are able to enter without detection must have a hearing, affording them some degree of procedural due process, before the United States can remove them. If the United States decides to remove an alien, it must conduct a hearing and make a determination that the individual is "deportable." Deportable aliens differ from excludable aliens in that the United States government recognizes the presence of the former group.

Normally, the distinction is unimportant because the United States deports or removes members of both classes. In some circumstances, however, no country is willing to accept these aliens and the question becomes, "[c]an the United States detain them indefinitely or should they be released into American communities?" This question exposes a tension between competing ideals: 1) the Constitutional protection of liberty and the collective distaste for incarceration without due process; and 2) the United States's sovereign right to control who enters its country and its need to protect its communities from dangerous people.

The Immigration and Nationality Act (INA) provides that any alien who has been deemed removable or inadmissible and "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." In addition, the INA requires the Attorney General to take into custody any alien deemed inadmissible or deportable because of a criminal violation. Once detained, the United States will release the alien only if: 1) it is necessary to do so in order to protect witnesses in criminal investigations and prosecutions, 2) the alien will not pose a danger to the safety of others or to property, and 3) the alien is likely to

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EXCLUDABLE VERSUS DEPORTABLE ALIENS

appear at all scheduled proceedings.\(^7\)

After the 1996 INA revisions were enacted, Attorney General Janet Reno interpreted it as mandating the detention of all aliens convicted of the specified crimes, and further decided that, pursuant to her authority under INA § 241, those aliens the United States could not remove or deport should be detained indefinitely.\(^8\) Justice Department officials feared that if these detainees committed crimes while paroled, then the political fallout would be massive.\(^9\) The Clinton Administration was unwilling to take such a risk, despite the fact that Democrats decried the new law.\(^10\)

As a result, the number of INS detainees grew rapidly during the late 1990s, reaching almost 20,000 by the beginning of 2001.\(^11\)

There is no doubt that the Constitution prohibits the indefinite detention of U.S. citizens without due process of law,\(^12\) and although the Fifth Amendment may seem to extend this protection non-citizens, the Supreme Court has not interpreted it this way.\(^13\)

Specifically, in 1953, the Court held that excludable aliens, who remain in the United States, have no Fifth Amendment right guaranteeing them release into the United States.\(^14\)

This is so because the United States does not recognize the physical presence of excludable aliens who remain in the country, and the Constitutional right to liberty does not attach to those outside the country’s borders.\(^15\) This rationale remained

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\(^7\) Id. § 235, 8 U.S.C. § 1226.

\(^8\) Id.; see Diane Marrero, Nowhere to Call Home, Detainees Stuck in U.S. Jails as Native Countries Refuse to Take Them Back, FLA. TIMES-UNION, Feb. 20, 2001, at A1.

\(^9\) Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999). “Due to the political and community pressure, the INS . . . has every incentive to continue to detain aliens with aggravated felony convictions.” Id. at 1157 (quoting St. John v. McElroy, 917 F. Supp. 243, 251 (S.D.N.Y. 1996)).

\(^10\) Marrero, supra note 8.

\(^11\) Id. This detention cost the Government almost a billion dollars annually. Id.

\(^12\) U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty or property without due process of law.”).

\(^13\) See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (recognizing that the due process required by the Fifth Amendment for citizens is different than for non-citizens).

\(^14\) Id.

\(^15\) Id.
unchallenged for nearly 50 years. Then, on January 31, 2001, a United States Court of Appeals ruled, in Rosales-Garcia v. Holland, that an immigration statute allowing indefinite detention of excludable aliens without due process is facially unconstitutional. A few months later, on June 28, 2001, in Zadvydas v. Davis, the Supreme Court ruled that indefinite detention of deportable aliens without due process of law raises a serious constitutional question. However, in order to avoid deciding the constitutional question, the Court interpreted INA § 241 as not allowing indefinite detention, and the Court declined to rule on the constitutionality of the statute as applied to inadmissible aliens.

At present, the circuits may disagree as to inadmissible and excludable aliens. However, if the Supreme Court faces the indefinite detention of excludable aliens, then it should strike it down. If the Supreme Court does so, then the INS would be

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16 But see Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1386–89 (10th Cir. 1981) (stating in dicta that an excludable alien “in physical custody within the United States may not be ‘punished’ without protections of the Fifth Amendment). Note that the court did not actually find indefinite detention to be unconstitutional, but rather, interpreted the applicable immigration statute as not permitting indefinite detention. Id. at 1386–90.

17 Zadvydas v. Davis resolved a conflict that existed between the Fifth and Ninth Circuits. 533 U.S. 678 (2001). Compare Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (holding the indefinite detention of deportable aliens to be constitutional) with Ma v. Reno, 208 F.3d 815 (9th Cir. 2000) (interpreting INA § 241(a)(c) as not allowing for detention of deportable aliens beyond nine months).


20 Id.

21 Id. at 692–94.

22 Zadvydas construed INA § 241 as limiting the detention of deportable aliens to nine months in order to avoid finding the statute unconstitutional. Id. The Court declined to extend their ruling to excludable and inadmissible aliens. Id. Thus, it is unclear whether the eleven circuits will interpret § 241 as limiting the detention of excludable and inadmissible aliens or whether they will interpret Zadvydas to mean that Mezei continues to allow the indefinite detention of excludable and inadmissible aliens but not deportable aliens.

† Under the newly-formed Department of Homeland Security, the Immigration and Naturalization Service is now known as the Bureau of Citizenship and Immigration
required to scrutinize each individual trying to gain entry into the
United States and protect those aliens who might otherwise be
labeled inadmissible and then paroled into the country. The INS
could protect such aliens by affording them the same protections
granted other aliens in the United States. Finally, if the INS
knows that a particular individual poses a danger to the United
States or its citizens, then the INS must disallow that particular
alien’s entry into the United States.

This article discusses the jurisprudence behind the Supreme
Court’s decision in Zadvydas and its effect on Rosales-Garcia and
other cases involving the constitutionality of indefinite detention
of excludable and inadmissible aliens. Section II discusses the
factual background and the holdings in Zadvydas and Rosales-
Garcia. Section III analyzes the effect of Zadvydas and likely
future Court rulings. Section IV concludes that the Constitution
and section 241 of the INA should apply to excludable and
inadmissible aliens as it does to deportable aliens. Such an
interpretation will promote the safety of United States citizens and
its visitors, and it will protect the liberty interests of all aliens in
the United States.

II. Legal Background

In 1950, the Supreme Court, in Knauff v. Shaughnessy, ruled
“[w]hatever the [removal] procedure authorized by Congress is, it
is [Fifth Amendment] due process as far as an alien denied entry is
concerned.” In 1953, based on this rationale, the Court handed
down the landmark decision of Shaughnessy v. Mezei, where it
ruled that indefinite detention of excludable aliens is constitutional
if authorized by Congress. The courts further applied this ruling
to aliens whom the United States sought to deport.

Services. However, for the purposes of this paper, this organization will continue to
be referred to as the INS. Ed.

23 Zadvydas, 533 U.S. 678; Rosales-Garcia, 238 F.3d 704.
24 See infra notes 27–180 and accompanying text.
25 See infra notes 181–246 and accompanying text.
26 See infra note 247 and accompanying text.
27 338 U.S. at 544 (1950).
29 Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), cert. granted, 531 U.S. 924 (2000).
In 2000, the Ninth Circuit Court of Appeals, in Ma v. Reno, split from other circuits and construed the INA as barring indefinite detention. In Zadvydas v. Davis, the Supreme Court resolved the split between the Fifth Circuit’s decision in Zadvydas v. Underdown and the Ninth Circuit’s decision in Ma v. Reno.

A. Zadvydas

1. Facts

Kestutis Zadvydas was born to parents of Lithuanian descent on November 21, 1948, in a displaced persons’ camp in a region of post-World War II Germany governed by the United States. In 1956, eight-year-old Zadvydas came to the United States with his parents, beneficiaries of a program for relocating displaced persons.

Zadvydas, at the age of seventeen, began a long career as a criminal. Twice convicted of attempted robbery in New York, once in 1966 and again in 1974, Zadvydas found himself in the custody of Virginia authorities in 1987 charged with possession of 474 grams of cocaine. While out on bail and awaiting trial, Zadvydas fled to Houston, Texas. While in Houston, Zadvydas managed to avoid the authorities until turning himself in to the police in 1992.

Subsequently convicted of possession of cocaine with the intent to distribute in Virginia on August 17, 1992, Zadvydas

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30 Id. Before the Supreme Court’s June 2001 decision in the case, John Ashcroft was substituted as the nominal party for Janet Reno. Id.


32 185 F.3d 279 (5th Cir. 1999), cert. granted, 531 U.S. 923 (2000). Prior to the Supreme Court’s June 2001 decision in the case, Christine Davis was substituted as the nominal party for Lynne Underdown and thus the decided case was Zadvydas v. Davis, 533 U.S. 678 (2001).

33 208 F.3d 815 (9th Cir. 2000), cert. granted, 531 U.S. 924 (2000).


35 Id.

36 Id.

37 Zadvydas v. Underdown, 185 F.3d 279, 283 (5th Cir. 1999).

38 Id.
received a sentence of sixteen years in prison, six of which were suspended.\textsuperscript{39} After serving just two years of his sentence, Zadvydas was released on parole.\textsuperscript{40} However, the Immigration and Naturalization Service (INS) immediately took him into custody in order to begin deportation proceedings.\textsuperscript{41} In fact, the INS had been trying to hold deportation proceedings against Zadvydas since 1977, when it first charged him as being deportable.\textsuperscript{42}

Pending disposition of the initial 1977 deportation proceeding, the INS released Zadvydas on his own recognizance.\textsuperscript{43} Five years later, in July 1982, the INS notified Zadvydas, by mail, that it would schedule his hearing for August 25, 1982.\textsuperscript{44} Zadvydas failed to appear.\textsuperscript{45} The enforcement arm of the INS did not hear from Zadvydas again until 1992 when he turned himself in to the police.\textsuperscript{46} During the intervening ten years, Zadvydas had married, fathered a child, held a job, obtained re-issuance of his green card,\textsuperscript{47} and filed income tax returns.\textsuperscript{48} He claimed he did not receive any of the letters the INS sent during this time.\textsuperscript{49}

The INS held Zadvydas without bond because the immigration judge\textsuperscript{50} determined that he would probably fail to appear for future

\begin{footnotesize}
\textsuperscript{39} Id.
\textsuperscript{40} Zadvydas, 986 F. Supp. at 1015.
\textsuperscript{41} Id.
\textsuperscript{42} See id. at 1014.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} See id.
\textsuperscript{47} A "green card" is proof of lawful permanent resident (LPR) status. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). LPRs are those aliens who have "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant . . . ." Id. They are one step away from naturalized citizenship. Id. § 316, 8 U.S.C. § 1427. An LPR may, however, be deported if he commits a listed offense under IIRIRA. Id. § 235, 8 U.S.C. § 1225.
\textsuperscript{48} Zadvydas, 986 F. Supp. at 1014.
\textsuperscript{49} Id.
\textsuperscript{50} Immigration judges are Administrative Law Judges and employees of the INS, which is within the Department of Justice. See Department of Labor, http://www.dol.gov/dol/organization.htm (last visited Jan. 25, 2003). They do not have life tenure and their proceedings are governed by the Administrative Procedures Act
\end{footnotesize}
proceedings. At his March 29, 1994, deportation proceeding, Zadvydas admitted his criminal history and conceded deportability. Zadvydas applied for a waiver but was denied on April 26, 1994, and ordered deported from the United States to Germany.

In May 1994, the INS began Zadvydas’s deportation; however, it soon found that no country would take him. Zadvydas claimed German citizenship, which the German government denied because his parents were Lithuanian. Lithuania also denied Zadvydas citizenship and refused to accept him. Zadvydas is “stateless,” that is, he is a citizen of no country. Faced with an inability to deport Zadvydas, the INS settled on indefinite detention.

2. Eastern District of Louisiana Federal District Court Decision

In September 1995, Zadvydas applied to the U.S. District Court for the Eastern District of Louisiana for a writ of habeas corpus. The court framed the issue as “whether a legal alien who is under a final order of deportation may be permanently

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51 Zadvydas, 986 F. Supp. at 1015.
52 Id.
53 INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).
54 Zadvydas, 986 F. Supp. at 1015.
55 Id.
56 Id. Birth in Germany alone does not confer German citizenship. Zadvydas v. Underdown, 185 F.3d 279, 283 (5th Cir. 1999). Unlike the United States, where citizenship is inherent to all those born within its borders, Germany, like many other countries, also requires some degree of German ancestry. Id. Zadvydas’s parents were not of German ancestry, but rather were displaced Lithuanians temporarily living in Germany. Id.
57 Zadvydas, 986 F. Supp. at 1015.
58 Id. “The fact of the matter is that the petitioner is not now nor has he ever been a citizen of any country.” Id. at 1027.
59 Id. at 1015.
60 Zadvydas, 185 F.3d at 283.
incarcerated because the INS cannot find a country to take him." The court found that Congress had granted the INS authority to take an alien into custody pending deportation and continue detention, unless the alien can show the INS that he poses no danger to society and is not a flight risk if released. Thus, the court concluded, "that 'indefinite detention of deportable aliens who are aggravated felons is statutorily authorized when immediate deportation is not possible and the alien has not overcome the presumption against his release.'" Then the court considered whether this comported with constitutional principles.

Initially the district court noted that "the Fifth Amendment's
mandate that ‘no person shall . . . be deprived of life, liberty, or property, without due process of law’ applies to persons within the territorial United States and not just U.S. citizens.”

The court next looked at the nature of the detention and whether it was punitive in nature or served some alternate purpose. Based on the legislative history and based on the stated purposes of protecting the community from habitual criminals and preventing aliens from fleeing before deportation, the court concluded that the detention was not for the purpose of punishment.

Then the court turned its attention to the question of whether the detention was “excessive in relation to” its purpose. The court stated that the “detention is intended for the sole purpose of effecting deportation” and when it becomes clear that deportation is not a possibility, “detention is no longer a temporary measure in the process of deportation.”

In examining the question of excessiveness, the court considered Tran v. Caplinger, a case from the Western District of Louisiana, which held indefinite detention of deportable aliens not to be excessive. The Zadvydas court rejected Tran’s conclusion. Although the court noted that the Fifth Circuit allowed indefinite detention of excludable aliens, the Zadvydas court did not feel bound by the Fifth Circuit decision because Zadvydas was a deportable alien.

Finally, the court looked at pre-1952 precedent and found that several courts had held unconstitutional the indefinite detention of

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66 Id. at 1025 (quoting U.S. Const. amend. V and citing Plyler v. Doe, 457 U.S. 202, 210–12 (1982) and Wong Wing v. United States, 163 U.S. 228 (1896)).

67 Id. at 1025–26. In Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1441 (5th Cir. 1993), the Fifth Circuit held that, when determining its constitutionality, the court must consider the purpose of the detention.


69 Id.

70 Id. The court analogized detention pending deportation to detention pending trial and stated that neither is justifiable unless it is a temporary measure. Id. (quoting Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981)).


72 Zadvydas, 986 F. Supp. at 1026 (citing Tran, 847 F. Supp. 469).

73 Id. (citing Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1441 (5th Cir. 1993)).
any sane citizen or alien, except as punishment for a crime.\textsuperscript{74} The court also examined other, more recent, cases, which held that if deportation is not possible within the foreseeable future, then detention for this purpose may not extend beyond a reasonable time—often interpreted as two to four months.\textsuperscript{75} Thus, the court ruled that indefinite detention of Kestutis Zadvydas was excessive, and therefore, unconstitutional.\textsuperscript{76} Accordingly, the district court granted Zadvydas’s application for a writ of \textit{habeas corpus} and ordered his release by December 12, 1997, forty-eight days after the writ was issued.\textsuperscript{77} The INS timely appealed.\textsuperscript{78}

\section*{3. Fifth Circuit Court of Appeals Decision}

The Fifth Circuit determined that Zadvydas was governed by the most recent version of IIRIRA,\textsuperscript{79} specifically § 305(c),\textsuperscript{80} which provides:

An alien ordered removed who is inadmissible under section [212] of this title, removable under section [237](a)(1)(C)\textsuperscript{81}... of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with

\textsuperscript{74} Id. (citing Petition of Brooks, 5 F.2d 238 (D. Mass. 1925) and United States ex rel. Ross v. Wallis, 279 F. 401 (2d Cir. 1922)).

\textsuperscript{75} Id. at 1027 (citing Fernandez v. Wilkinson, 505 F. Supp. 787, 792 (D. Kan. 1980)). The district court noted that Congress subsequently passed INA § 242(c), which has since been repealed, limiting detention of deportable aliens to six months. \textit{Id.} (citing INA § 242(c), 8 U.S.C. 1252(c) (repealed 1996)). The court did not discuss at length the constitutionality of Congress’s shift in policy away from detention of a limited duration toward indefinite detention. But, the court did state that based on the rationale of \textit{Fernandez} and other cases and § 242(c), that Zadvydas’s “detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served by 8 U.S.C. § 1252(a).” \textit{Id.} (citing INA § 242(a)–(c), 8 U.S.C. § 1252(a)–(c)).

\textsuperscript{76} Id.

\textsuperscript{77} \textit{Id.} at 1027–28. The court ruled on October 30, 1997, and provided for a November 12, 1997, hearing at which time the court would set the conditions for Zadvydas’s release from INS custody. \textit{Id.}

\textsuperscript{78} Zadvydas v. Underdown, 185 F.3d 279, 284 (5th Cir. 1999).

\textsuperscript{79} \textit{Id.} at 286–87.

\textsuperscript{80} Immigration and Nationality Act § 241(a)(6), 8 U.S.C. § 1231(a)(6).

\textsuperscript{81} This section includes aliens, such as Zadvydas, convicted of aggravated felonies or controlled substance violations. \textit{Id.}
the order of removal, may be detained beyond the removal period.\textsuperscript{82}

The court interpreted this section to mean the decision to detain an alien, such as Zadvydas, indefinitely was purely within the discretion of the Executive Branch.\textsuperscript{83} The regulations promulgated to enforce the statute called for the release of aliens, like Zadvydas, who were not "a threat to the community" and were "likely to comply with the removal order."\textsuperscript{84} The regulations also called for: 1) review of the status of such aliens to determine whether release is appropriate; 2) a listing of the reasons for the custody or release decision; and 3) an opportunity to appeal any decision to the Board of Immigration Appeals.\textsuperscript{85}

The Fifth Circuit determined that these procedures ensured that Zadvydas's detention was finite and when Zadvydas no longer posed a threat to the community "he would doubtless be released."\textsuperscript{86} The court also disputed the district court's finding that Zadvydas would never be deported, acknowledging that "locating a country to which Zadvydas may be deported has been and will be difficult at best."\textsuperscript{87} However, the court optimistically concluded that some country might accept Zadvydas.\textsuperscript{88}

The court discussed at length its decision in \textit{Gisbert v. United

\textsuperscript{82} Id.

\textsuperscript{83} Zadvydas, 185 F.3d at 287.

\textsuperscript{84} Id. (citing 8 C.F.R. §§ 236.1(d)(2)(ii), 236.1(d)(3)(iii), 241.4 and 241.5 and February 3, 1999, "Memorandum for Regional Directors" from INS Executive Associate Commissioner Michael A. Pearson concerning "Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable" [hereinafter "Pearson Memorandum"]).

\textsuperscript{85} Id. (citing 8 C.F.R. §§ 236.1(d)(2)(ii), 236.1(d)(3)(iii), 241.4 and 241.5 and Pearson Memorandum, supra note 84).

\textsuperscript{86} Id. at 288.

\textsuperscript{87} Id. at 291. The court went on a lengthy discussion of the failed efforts to return Zadvydas to Germany and Lithuania, but seemed to suggest that unexplored options remained, specifically, continuing to explore the possibility of getting Germany or Lithuania to accept him or, in the alternative, attempting to establish Russian citizenship on behalf of Zadvydas and deport him there. Id. at 291–94. The Fifth Circuit seemed to have trouble accepting the conclusion that Zadvydas is "stateless," instead contending that while it will be difficult to establish his citizenship, surely he is a citizen of some country. Id. at 292.
States Attorney General,\textsuperscript{89} where it ruled that indefinite detention of excludable aliens is permissible under the Constitution.\textsuperscript{90} In Zadvydas, the Fifth Circuit stated “we do not believe that the difference between excludable aliens and resident aliens mandates a radical departure from the reasoning of Gisbert when, as here, a final decision to deport the once resident alien has been made.”\textsuperscript{91} Zadvydas exhorted the court to find that there is a difference in constitutional protections afforded excludable aliens and deportable resident aliens.\textsuperscript{92} The court declined to do so, stating “there is little, if any, room for distinction between the rights . . . of excludable aliens and resident aliens when their circumstances

\textsuperscript{89} 988 F.2d 1437, 1441 (1993).

\textsuperscript{90} Zadvydas, 185 F.3d at 288–90. In Gisbert, the Fifth Circuit relied on the proposition that under the Constitution, the “power to ‘establish an uniform Rule of Naturalization’” is placed in the legislative branch while the executive branch enjoys the “‘power to control the foreign affairs of the nation.’” \textit{id.} at 288 (citing U.S. CONST. art. I, sec. 8, cl. 4 and United States \textit{ex rel.} Knauff v. Shaughnessy, 338 U.S. 537 (1950)). The court explained that “these principles taken together” make it clear that “‘the power to expel or exclude aliens [is] a fundamental sovereign’” power and that this power is “essentially plenary.” \textit{id.} at 288–89 (quoting Shaughnessy v. United States \textit{ex rel.} Mezei, 345 U.S. 206, 209 (1953)). The Gisbert court did not dispute that aliens “claim some constitutional protections,” such as the right to be free from punishment without due process of law but noted that “because of their special position, certain classifications and restrictions that would be intolerable if applied to citizens are allowable when applied to resident aliens.” \textit{id.} (citing Cabel v. Chavez-Salido, 454 U.S. 432 (1982)). Based on its understanding of the division of power as to immigration matters, the Gisbert court concluded that “excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the alien’s country of origin indicates it will not accept their return.” \textit{id.} at 290 (citing Gisbert, 988 F.2d at 1448). In Gisbert, the detainees contended that their detention constituted punishment without a criminal trial and was indefinite in nature. \textit{id.} at 290. This argument was rejected by the Fifth Circuit, which ruled the detention to be administrative in nature and not indefinite. \textit{id.}

\textsuperscript{91} \textit{id.} at 290.

\textsuperscript{92} \textit{id.} at 294. The reality is that resident aliens are one step away from citizenship and often have lived in this country for some time. In addition, they have been granted entry into this country and permission to live here. Excludable aliens, on the other hand, are those who have been rejected as they tried to enter this country. While it is true that many have been paroled for various reasons—and therefore are physically in this country—most courts, including the Mezei court, recognize a legal fiction known as the “entry fiction” that treats excludable aliens as if they are still outside our borders. This legal fiction denies the excludable aliens the same protection as other aliens who are either legally or illegally within our borders.
are so similar." Thus, it ruled, "Zadvydas's detention is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process." 

Zadvydas petitioned for a rehearing *en banc*, but the court denied his petition. Subsequently, he petitioned for a writ of *certiorari* to the Supreme Court; the Court granted *certiorari* on October 10, 2000. The case was consolidated with *Reno v. Ma*, allowing the Supreme Court to address the difference between the Ninth and Fifth circuits regarding the detention of removable aliens.

**B. Ma**

The U.S. District Court for the Western District of Washington considered five lead cases from over one hundred petitions for writs of *habeas corpus* that concerned the constitutionality of indefinitely detaining non-deportable aliens. The petitioners were lawful permanent residents of the United States whom the United States ordered deported due to crimes they committed. They all faced long-term, possibly indefinite, INS detention. For the sake of uniformity and efficiency, a panel of five district judges decided the constitutional issues, with individual application of the decision to the facts of each claim to follow.

**1. Facts**

Ma was born in Cambodia in 1977. At the age of seven, he came to the United States as a refugee and became a lawful
permanent resident two years later in 1987. In 1995, at age seventeen, Ma received a conviction for first-degree manslaughter for an act involving a gang-related killing. He received a sentence of thirty-eight months imprisonment. Due to good behavior, he left confinement after twenty-six months, at which time the INS took him into custody, placed him in deportation proceedings, and subsequently ordered him removed in 1997. Subject to a final deportation order, Ma was in INS custody until 1999 when the case came to the district court.

2. *Western District of Washington Federal District Court Decision*

The district court considered the statutory framework that affected the petitioners and then ruled on both the procedural and substantive due process claims of the petitioners. The court asserted that Fifth Amendment "protection extends to all 'persons' within the borders of the United States, including deportable aliens." Based on the "entry fiction" recognized in *Shaughnessy v. United States, ex rel. Mezei*, the court acknowledged the exception for aliens in exclusion proceedings, whether the United States detains the alien at the border or paroles the alien into the country. However, the court made unequivocal its position that

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102 Ma v. Reno, 208 F.3d 815, 818–19 (9th Cir. 2000). The history outlined by the district court contained inconsistencies, and so the more thorough histories reported by the Ninth Circuit and the Supreme Court are used for purposes of this note. For the factual account given by the Supreme Court, see Zadvydas v. Davis, 533 U.S. 678, 685–86 (2001).

103 Ma, 208 F.3d at 819.


105 Id.

106 Phan v. Reno, 56 F. Supp. 2d 1149, 1151–52 (W.D. Wash. 1999). The statutory framework used by the Washington District Court was similar to that which was used in Zadvydas. See Zadvydas v. Caplinger, 986 F. Supp. 1011, 1024–25 (E.D. La. 1997).


108 Id. at 1153–54 (citing Shaughnessy v. United States, *ex rel. Mezei*, 345 U.S. 206 (1953) and Barrera-Echeveria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (*en banc*). Barrera-Echeveria was initially decided in favor of the petitioner, but then overruled by the *en banc* court, which applied the Mezei case without distinguishing it as the prior decision had. Barrera-Echeveria v. Rison, 21 F.3d 314 (9th Cir. 1994), *rev'd en banc*, 44 F.3d 1441 (9th Cir. Cal. 1995).
lawful permanent residents were entitled to a higher standard of due process than excludable aliens were, even after the United States enters an order of deportation against them.\textsuperscript{109}

The court then turned its attention to the petitioners’ substantive due process claims.\textsuperscript{110} At issue was the “petitioners’ fundamental liberty interest in being free from incarceration.”\textsuperscript{111} The court looked at the nature of the detention and concluded it was for regulatory purposes.\textsuperscript{112} The court recognized three legitimate government purposes for detention: “(1) ensuring the removal of aliens ordered deported; (2) preventing flight prior to deportation; and (3) protecting the public from dangerous felons.”\textsuperscript{113} The court then considered whether the petitioners’ “detention[s] [were] excessive in relation to these government interests.”\textsuperscript{114} It employed a sliding scale where “as the probability that the government can actually deport an alien decreases, the government’s interest in detaining that alien becomes less compelling and the invasion into the alien’s liberty more severe.”\textsuperscript{115} Because “detention by the INS can be lawful only in

\begin{footnotes}
\item[109] Phan, 56 F. Supp. 2d at 1154. The court noted that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly” and that the “petitioners are long-time permanent legal residents of the United States and, as such, are ‘persons’ entitled to the protection of the Fifth Amendment, despite having been ordered deported.” Id. (quoting Plasencia, 459 U.S. at 32).
\item[110] Id. at 1154–56.
\item[111] Id. at 1154 (quoting Fouche v. Louisiana, 504 U.S. 71, 80 (1992), for the proposition that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause”).
\item[112] Id. at 1154–55 (citing Reno v. Flores, 507 U.S. 292, 301-02 (1993)). The court rejected the government’s assertion that the plenary power doctrine constrained their jurisdiction over this issue saying:

While the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention. Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a means by which the government implements Congress’s directives.

Id. at 1155.
\item[113] Id. at 1155–56 (citing INA § 241(a)(c), 8 U.S.C. § 1231(a)(c)).
\item[114] Id. at 1156 (emphasis omitted).
\item[115] Id.
\end{footnotes}
aid of deportation,” the court ruled it “excessive to detain an alien indefinitely if deportation will never occur.”\textsuperscript{116}

Next, the court considered the procedural due process claims, noting that the constitutional sufficiency of any set of procedures depends on the circumstances.\textsuperscript{117} Accordingly, it reviewed “the existing procedural framework, [and] then [it] consider[ed] ‘the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures.’\textsuperscript{118} The court again identified the petitioners’ interest as “freedom.”\textsuperscript{119} It then said “release decisions are based upon either the [INS] District Director’s review of the alien’s written submissions and administrative file or an interview with the alien,” but found this procedure lacking because “‘[d]ue to political and community pressure, the INS ... has every incentive to continue to detain aliens with aggravated felony convictions.’\textsuperscript{120}

Based on its “review of the record,” the district court found the “INS does not meaningfully and impartially review the petitioners’ custody status” because it does not use “any individualized assessment or consideration of the petitioners’ situations in light of the [regulations].”\textsuperscript{121} Thus, the court ruled “[a]t a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release” and that the “immigration judge must actually consider the factors set forth” in the regulations and how they

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 1156–58.

\textsuperscript{118} Id. at 1156.

\textsuperscript{119} Id. at 1157.


\textsuperscript{121} Id. at 1157; see 8 C.F.R. § 241.5 (2002).
apply to the individual petitioner.\textsuperscript{122}

The district court made an individual determination for Kim Ho Ma four days later.\textsuperscript{123} Citing the joint order, the court said "[t]he government’s continued detention of Ma violates his right to substantive due process if it is excessive in relation to the government’s interests in effectuating his deportation."\textsuperscript{124} Faced with what it considered an incomplete record, the court scheduled a hearing on the matter of whether the INS had sought to deport Ma and whether such deportation was foreseeable in order to apply the balancing test.\textsuperscript{125} On September 29, 1999, the district court granted Ma’s writ of \textit{habeas corpus}.\textsuperscript{126}

3. Ninth Circuit Court of Appeals Decision

The Ninth Circuit considered "whether . . . the Attorney General has the legal authority to hold Ma . . . in detention indefinitely, perhaps for the rest of his life."\textsuperscript{127} While noting that the district court’s ruling found a basis in the constitutionality of the INS’s detention policy, the Ninth Circuit began its analysis by examining the statutory authority granted the INS and the Attorney General.\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{122} \textit{Phan}, 56 F. Supp. 2d at 1157; see 8 C.F.R. § 241.5 (2002). The problem created by this portion of the ruling is that it would allow judicial review of agency decisions in order to discover if the adjudicator considered the factors in the regulation and applied them to the facts of each petitioner. This would seem to violate the plenary power doctrine.
\item \textsuperscript{123} \textit{Id.} at 1166 (citing \textit{Phan}, 56 F. Supp. 2d, at 1149).
\item \textsuperscript{124} \textit{Id.} at 1166 (citing \textit{Phan}, 56 F. Supp. 2d, at 1149).
\item \textsuperscript{125} \textit{Id.} The record contained no evidence as to whether the government had sought the assistance of the Cambodian government or whether Cambodia was likely to accept Ma. \textit{Id.} In addition, there was an indication that Ma had made a Torture Convention Claim, but the court did not know what to make of this. \textit{Id.; see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027; (December 10, 1984), entered into force June 26, 1987; for the United States November 20, 1994, ratified by § 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 and 8 C.F.R. § 208 as amended by Regulations Concerning the Convention Against Torture: Interim Rule 64 FR 8478–92 (February 19, 1999) (effective March 22, 1999); 64 FR 13881 (March 31, 1999).}
\item \textsuperscript{126} \textit{Ma}, 208 F.3d at 819. There does not appear to be a published opinion associated with this order.
\item \textsuperscript{127} \textit{Id.} at 818.
\item \textsuperscript{128} \textit{Id.} at 820.
\end{enumerate}
\end{footnotesize}
EXCLUDABLE VERSUS DEPORTABLE ALIENS

The court noted that the general framework for removal called for removal within ninety days after an order became administratively final, but removal within the ninety-day period was not always possible, in particular when the alien’s country of origin does not have a repatriation agreement with the United States. The court found that many deportable aliens must be released, subject to rigorous supervisory regulations, but that others, including Ma, “may be detained beyond the removal period.”

Looking at the statute’s text, the court stated that it compelled neither the government’s assertion that it allowed for indefinite detention, nor Ma’s assertion that this authority does not extend to those aliens whose removal is not likely in the foreseeable future.

Thus, the Ninth Circuit perceived its duty of statutory construction as requiring it to read in a restriction on the length of time detention may continue beyond the ninety-day removal period. The Ninth Circuit ruled that “Congress did not grant the INS authority to detain indefinitely aliens who . . . have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement,” instead construing “the statute as providing the INS with authority to detain aliens only for a reasonable time.”

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129 Id. (citing INA §§ 241(a)(1)(A)–(B) and 241(a)(1)(B)(ii), 8 U.S.C. §§ 1231(a)(1)(A)–(B) and 1231(a)(1)(B)(ii)).

130 Id. at 820–21. The court identified three categories of aliens whose removal extends beyond the ninety-day period. Id. The first are those individuals who simply require more processing time, the second are those aliens who have been ordered removed to countries with which the United States does not have a repatriation agreement, specifically, Cambodia, Vietnam, and Laos, and the third category includes those aliens, like Zadvydas, who are “stateless.” Id.

131 Id. (citing INA § 241(a)(3), 8 U.S.C. 1231(a)(3)). The regulations provide for, among other things, regular appearances before an immigration officer, maintaining records of whereabouts and employment with the INS, submitting to medical and psychiatric testing, and severe travel restrictions. INA § 241(a)(3), 8 U.S.C. § 1231(a)(3).

132 Id. (emphasis omitted)(quoting INA § 241(a)(6), 8 U.S.C. § 1231(a)(6)). Ma is placed in this group because of his conviction for first degree manslaughter. Id.

133 Id.

134 Id. The two options the court referenced were “indefinite” detention and detention for a “reasonable time.” Id.

135 Id. at 821–22.
The court felt this construction: 1) avoided the issue of whether indefinite detention by the INS violates the Due Process Clause of the Fifth Amendment;\textsuperscript{136} 2) was the most reasonable;\textsuperscript{137} 3) was consistent with other Ninth Circuit opinions construing similar provisions in other immigration statutes;\textsuperscript{138} and 4) was the most consistent with international law.\textsuperscript{139} Accordingly, the lower court decision was upheld for different reasons, and the Ninth Circuit ruled that Ma's detention had already exceeded a reasonable time.\textsuperscript{140} The government petitioned for a writ of

\textsuperscript{136} Id. at 822. The government argued that the Barrera-Echeveria decision holding that indefinite detention of excludable aliens comports with the Fifth Amendment's Due Process Clause. Id. at 823. The Ninth Circuit made clear that the situation of excludable aliens was very different than that of LPRs subject to a final order of removal, noting that Barrera-Echeveria spoke to the fact that Supreme Court jurisprudence on immigration law has long made a distinction between excludable aliens and those who have entered our country, extending far more constitutional protection to those who are within our borders. Id. at 825-26. Were the court to have construed the statute as allowing indefinite detention, it would have faced a "substantial constitutional question." Id. at 827. In addressing Zadvydas, the Ninth Circuit made clear that, while it was not ruling on the constitutionality of indefinite detention, it would likely not agree with the Fifth Circuit's conclusion that indefinite detention is constitutional. Id. at 827.

\textsuperscript{137} Id. at 822. The court reasoned that the provision allowing the INS to hold individuals beyond the ninety-day period demonstrated Congress's intent that the ninety-day time limit not be absolute in all cases, not to allow indefinite detention. Id. at 827. It felt that "some greater degree of specificity or demonstration of congressional intent would be necessary" before it could conclude that any statute would grant the INS so much authority, and it felt it unreasonable to presume Congress would approve of such a drastic measure in so vague a manner. Id. at 827-28.

\textsuperscript{138} Id. at 822; see Spector v. Landon, 209 F.2d 481 (9th Cir. 1954), Wolk v. Weedin, 58 F.2d 928 (9th Cir. 1932), Saksagansky v. Weedin, 53 F.2d 13 (9th Cir. 1931), Caranica v. Nagle, 28 F.2d 955 (9th Cir. 1928); see also United States ex rel. Ross v. Wallis, 279 F. 401 (2d Cir. 1922).

\textsuperscript{139} Ma, 208 F.3d at 822. The court applied the Charming Betsy rule, which requires that courts generally should avoid construing statutes in a manner that would make them violate international law. Id. at 830 (citing Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (citing Murray v. The Schooner Charming Betsy, 6 U.S. 64, 117-18 (1804))). The court then noted that a "'clear international prohibition' exists against prolonged arbitrary detention." Id. (citing Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998)). Also, the court cited Article 9 of the International Covenant on Civil and Political Rights (ICCPR), providing that "no one shall be subjected to arbitrary arrest and detention." ICCPR, 999 U.N.T.S. 171, 21 U.N. GAOR Supp. (No. 16) at 54, ratified by the United States on April 2, 1992, 138 Cong. Rec. S4781–84. Therefore, the court said "construing the statute to authorize the indefinite detention of removable aliens might violate international law." Ma, 208 F.3d at 830.

\textsuperscript{140} Ma, 208 F.3d at 831.
certiorari to the Supreme Court. The Court granted the writ on October 10, 2000, and the case was consolidated with Zadvydas v. Underdown.\textsuperscript{141}

\textit{C. Supreme Court Decision}

The Supreme Court granted \textit{certiorari} to Zadvydas and \textit{Ma} in order to resolve a conflict between the Fifth and Ninth Circuits.\textsuperscript{142} It delivered a five-to-four opinion\textsuperscript{143} and remanded the two cases to their respective circuits for further proceedings consistent with the opinion of the Court.\textsuperscript{144}

The Court first set out, in pertinent part, the statute authorizing detention “beyond the removal period” of aliens the Government fails to remove during the ninety-day removal period.\textsuperscript{145} Then it addressed “whether this post-removal-period statute authorizes the Attorney General to detain a removable alien \textit{indefinitely} beyond the removal period or only for a period \textit{reasonably necessary} to secure the alien’s removal.”\textsuperscript{146}

The Government argued that, by its words, INA § 241 allows the Government, in the discretion of the Attorney General, to detain aliens like Zadvydas and \textit{Ma} for as long as it deems necessary.\textsuperscript{147} The Court felt that indefinite detention of an alien

\footnotesize{143} \textit{Id.} Justice Breyer delivered the opinion of the Court and was joined by Justices Ginsberg, O’Conner, Souter, and Stevens. \textit{Id.} at 682–702. Justice Scalia was joined by Justice Thomas in a dissent as to part I. \textit{Id.} at 702-05. In a separate dissent, Justice Kennedy was joined by Chief Justice Rehnquist and Justices Scalia and Thomas as to part I also. \textit{Id.} at 705–25.
\footnotesize{144} \textit{Id.} at 702.
\footnotesize{145} \textit{Id.} at 683 (quoting INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (Supp. V 1994)).
\footnotesize{146} \textit{Id.} at 682. Significantly, the Court makes clear that it is not considering the statute’s application to “[a]liens who have not yet gained initial admission to this country,” because that “would create a very different question.” \textit{Id.} By stating this at the outset, the Court narrows its ruling to those aliens subject to an order for removal and expressly does not consider the plight of excludable aliens such as Mario Rosales-Garcia. \textit{See} Rosales-Garcia v. Holland, 238 F.3d 704 (6th Cir. 2001). This is despite the fact that, like the issue of deportable aliens, there is also a split in the circuits as to the interpretation and constitutionality of § 241(a)(6) as it applies to excludable aliens. \textit{See} \textit{id.}; Gisbert v. United States Attorney Gen., 988 F.2d 1437 (5th Cir. 1993).
\footnotesize{147} Zadvydas, 533 U.S. at 688–89 (referencing INA § 241(a)(6), 8 U.S.C. §
would, at the least, raise a serious constitutional question because the "Fifth Amendment's Due Process Clause forbids the Government to 'deprive' any 'person . . . of . . . liberty . . . without due process of law.'"

The Court also said "it is a cardinal principle" of statutory interpretation . . . 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.' For this reason, the Court "read an implicit limitation into INA § 241(a)(6)."

The Court stated that, in its view, "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."

Focusing on the statute's purposes, the Court said that once removal in the near future is no longer possible, the concern over flight risk is relatively weak. As for the goal of "protecting the community," the Court acknowledged that it does not diminish over time, but said that this alone cannot justify indefinite detention without some limitation to "specially dangerous individuals" who have exhibited "some other special circumstance, such as mental illness" and who are afforded "strong procedural protections." The Court was troubled by the

1231(a)(6) (Supp. V 1994)).

148 Id. at 689-90. The Court cited Foucha v. Louisiana, 504 U.S. 71, 80 (1992), for the proposition that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Fifth Amendment. Id. at 690. The Court also noted that in United States v. Salerno, 481 U.S. 739, 746 (1987), a case that allowed pre-trial detention of certain criminals, the decision was limited to "criminal proceeding[s] with adequate procedural protections." Id.

149 Id. (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

150 Id. at 689 (referencing 8 U.S.C. § 1231(a)(6) (Supp. V 1994)).

151 Id.

152 Id. at 690.

153 Id.

154 Id. at 691. The Court cites Kansas v. Hendricks, 521 U.S. 346, 356 (1997), as "upholding [a] scheme that imposes detention upon 'a small segment of particularly dangerous individuals' and provides 'strict procedural safeguards'" and cites United States v. Salerno, 481 U.S. 739, at 747, 750–52 (1987), as "upholding pretrial detention, stressing (1) 'stringent time limitations,' (2) the fact that detention is reserved for the 'most serious of crimes,' (3) the requirement of proof of dangerousness by clear and
lack of procedural safeguards and the indefinite nature of the detention, as well as the breadth of the application of INA § 241(a)(6) to “aliens ordered removed for many and various reasons, including tourist visa violations.” Thus, the Court concluded, besides dangerousness, the only “special circumstance” that exists is “the alien’s removable status itself, which bears no relation to a detainee’s dangerousness.”

Next, the Court addressed the Government’s contention that, under *Mezei* it has constitutional authority to detain indefinitely both excludable and deportable aliens. The Court was quick to distinguish between the two because, for constitutional purposes, *Mezei* was treated “as if stopped at the border,” and this “made all the difference.” Thus, the Court said, “[i]n light of this critical distinction between *Mezei* and the present cases, *Mezei* does not offer the Government significant support, and we need not consider the aliens’ claim that subsequent developments have undermined *Mezei*’s legal authority.”

Construing the statute, 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.” Instead, the Court read an implied limit for detention to a “period reasonably necessary to secure removal” of the alien, where reasonableness would depend on the “set of particular

155 Id. (citing INA § 241(a)(6), 8 U.S.C. 1231(a)(6) (Supp. V 1994) (referencing INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C)). The Court very carefully noted that this case might be decided differently if the statute were tailored narrowly to only affect “a small segment of particularly dangerous individuals” such as “suspected terrorists.” Id. (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997)).

156 Id. at 691–92.

157 Id. at 692.

158 Id. at 692–93 (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213, 215 (1953)).

159 Id. at 693.

160 Id. at 694.

161 Id. at 696–97. The Court noted that the basic purpose of the statute was to effectuate deportation and, so, once deportation becomes unlikely, the Court reasoned, the purpose of the statute could not be furthered by continuing to detain aliens. Id. The Court also examined the history of the statute and found nothing that clearly demonstrated an “intent to authorize indefinite, perhaps permanent, detention.” Id. at 699.
circumstances” related to each individual.\textsuperscript{162} It further stated that courts “should measure reasonableness primarily in terms of the statute’s basic purpose, namely assuring the alien’s presence at the moment of removal.”\textsuperscript{163} and that “if removal is not reasonably foreseeable, [a] court should hold continued detention unreasonable and no longer authorized by statute.”\textsuperscript{164} As a bright-line rule, the Court held that after an additional six months beyond the original ninety-day removal period, detention is presumptively unreasonable and the burden falls on the Government to rebut this presumption.\textsuperscript{165}

The Court remanded the two cases for consideration in light of its opinion.\textsuperscript{166} With regard to \textit{Zadvydas}, the Court said the requirement that an alien show “the absence of \textit{any} prospect of removal” was too high a standard to bear.\textsuperscript{167} As to \textit{Ma}, the Court ruled that more findings needed to be made as to the likelihood of successful future negotiations for a repatriation agreement between the United States and Cambodia.\textsuperscript{168} Justice Kennedy, in his dissent, accepted the “premise that a substantial constitutional question is presented by the prospect of lengthy, even unending, detention,” but rejected the statutory construction of the majority. He claimed that it “has no basis in the language or structure of the INA and in fact contradicts and defeats the purpose set forth in the express terms of the statutory text.”\textsuperscript{169}

Kennedy’s dissent also found the majority opinion to be inconsistent with \textit{Mezei}, which the majority declined to overturn.\textsuperscript{170} The INA § 241(a)(6) allows for detention beyond the ninety-day removal period for not only deportable aliens but also

\textsuperscript{162} \textit{Id.} at 699.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.} at 699–700. The Court expressly approved of supervised release and the ability to return the alien to custody for violations of the supervisory conditions. \textit{Id.}

\textsuperscript{165} \textit{Id.} at 700–02.

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{Id.} at 702.

\textsuperscript{169} \textit{Id.} at 706–07.

\textsuperscript{170} \textit{Id.} at 719–20 (citing Shaughnessy v. United States \textit{ex rel.} Mezei 345 U.S. 206 (1953)).
for excludable aliens.\textsuperscript{171} Thus, the dissent stated that by reading in a time limitation as to deportable aliens, reason dictates that you must also read a reasonable time limitation as to excludable aliens.\textsuperscript{172} Limiting the Government’s power to regulate excludable aliens and their admission into the country would, in Kennedy’s opinion, infringe on the legislative and executive branches’ plenary power over immigration and naturalization matters by forcing the Government to let excludable aliens into the country.\textsuperscript{173}

The Kennedy dissent also criticized the majority on a number of public policy grounds.\textsuperscript{174} In sum, Kennedy contends that the current regime of periodic review satisfies the due process clause and is “real, not illusory.”\textsuperscript{175} He suggests that it would be better to evaluate the procedures, to ensure that they continue to protect the interests of the deportable aliens.\textsuperscript{176}

\textbf{D. Ma and Zadvydas on Remand}

On remand, the Ninth Circuit reissued its opinion in \textit{Ma v. Reno},\textsuperscript{177} with a clarification regarding the likelihood of eventual deportation.\textsuperscript{178} The Fifth Circuit, in \textit{Zadvydas v. Davis},\textsuperscript{179} upheld

\begin{itemize}
  \item \textsuperscript{172} \textit{Zadvydas}, 533 U.S. at 710. It is not plausible to imply a time limit as to one class and not the other.
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.} 713–18. Kennedy suggests that: (1) the new rule would “encourage dilatory and obstructive tactics by aliens” seeking to make “their own repatriation or transfer seem [un]foreseeable;” (2) the “risk to the community posed by . . . [the aliens] is far from insubstantial;” and (3) the new rule would open the flood gates, causing nearly all deportable and excludable aliens in custody to reenter the community. \textit{Id.} at 713–14. Significantly, the dissent viewed the majority’s opinion as “broad enough to require even that inadmissible and excludable aliens detained at the border be set free in our community.” \textit{Id.} at 716. Justice Scalia joined in the dissent, writing separately. \textit{Id.} at 702–05. He felt that whatever process is due, it does not mandate release of any deportable, excludable, or inadmissible aliens into the community. \textit{Id.} He did share Kennedy’s view that the majority opinion is inconsistent with \textit{Mezei}. \textit{Id.}
  \item \textsuperscript{175} \textit{Id.} at 723.
  \item \textsuperscript{176} \textit{Id.} at 724–25.
  \item \textsuperscript{177} \textit{208 F.3d 815} (9th Cir. 2000).
  \item \textsuperscript{178} \textit{Ma. v. Ashcroft}, 257 F.3d 1095 (9th Cir. 2001). The Ninth Circuit made clear that it was not just the lack of a repatriation agreement with Cambodia, but also the lack of any negotiations between the countries that made removal unlikely. \textit{Id.} at 1099.
  \item \textsuperscript{179} \textit{285 F.3d 398} (5th Cir. 2002).
\end{itemize}
the district court’s ruling; it found that it is unlikely Zadvydas will be deported any time in the foreseeable future.\textsuperscript{180}

III. Analysis

\emph{Zadvydas} seemed to clear the waters for lawful permanent residents deemed removable or deportable. However, it only muddied the waters for those aliens deemed excludable. What of their fate: indefinite detention, or supervised release? Is the “entry fiction” dead, or did the Supreme Court’s careful sidestepping of the issue mean that the doctrine is alive-and-well? In addition, it is unclear what effect \emph{Zadvydas} has on suspected terrorists, whose indefinite detention is authorized by the INA.\textsuperscript{181}

\textbf{A. Effect on Deportable Aliens}

While many hailed \emph{Zadvydas} as a landmark decision, the Court left open the possibility for more narrowly tailored regulations to allow for indefinite detention when the alien’s dangerousness coincides with a “special circumstance.”\textsuperscript{182} In response to the decision, the current administration has been working busily to undermine \emph{Zadvydas} by enumerating several such “special circumstances.”\textsuperscript{183} Under its new regulations, the INS may

\textsuperscript{180} \textit{Id.} The district court previously granted a writ of habeas corpus to Zadvydas. United States v. Zadvydas, 986 F. Supp. 1011 (E.D. La. 1997).

\textsuperscript{181} INA § 236, 8 U.S.C. § 1226a. However, according to 8 U.S.C. § 1226a(a)(6) (Supp. 2002) (a revised statute) an alien may be detained for additional periods up to 6 months only if the release of the alien will threaten national security.


\textsuperscript{183} See Alfonso Chardy, \textit{Long-Term Detention Unconstitutional, but... INS Allows ‘Special Circumstances’ for Indefinite Custody}, \textit{SUNDAY GAZETTE MAIL}, Nov. 25, 2001, at C4, \textit{available at LEXIS, News Library, All News Group File}. Cheryl Little, executive director of the Florida Immigrant Advocacy Center described the new regulations as “a serious effort to circumvent the Supreme Court decision that indefinite detention is unconstitutional.” Alfonso Chardy, \textit{New INS Detainee Regulations Dance on Interpretation of Supreme Court Ruling}, \textit{MIAMI HERALD}, Nov. 24, 2001, \textit{available at LEXIS, News Library, News Group File}. In a hearing before the House Judiciary’s subcommittee on Immigration and Claims, Joseph Greene, INS Acting Deputy Director Executive Associate Commissioner for Field Operations, and Edward McElroy, INS District Director for New York, testified that the Supreme Court “recognized that there may be special circumstances, such as those involving terrorists or especially dangerous individuals” for whom “continued detention may be appropriate even if removal is unlikely in the reasonably foreseeable future.” \textit{Prepared Statement of Joseph Greene, Acting Deputy Director Executive Associate Commissioner for Field Operations, and...}
continue to detain aliens covered by *Zadvydas* indefinitely if they
1) have "a highly contagious disease;"\(^{184}\) 2) have been "detained,
on account of serious adverse foreign policy consequences of
release;"\(^ {185}\) 3) have been "detained on account of security or
terrorism concerns;"\(^ {186}\) or 4) are "determined to be specially
dangerous."\(^ {187}\) It remains to be seen how this provision will be

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\(^{184}\) 8 C.F.R. § 241.14(b). The procedures require a medical examination
and continued treatment for such individuals and the INS is directed only to detain them on
the recommendation of the Public Health Service. *Id.* In addition, such individuals are
to be released once they no longer pose a threat. *Id.*

\(^{185}\) *Id.* § 241.14(c). This includes those whose entry or proposed activities in
the United States are deemed by the Secretary of State to "have potentially serious adverse
(defining classes of aliens to be excluded from entry into the United States); see also 8
U.S.C. § 1227(a)(4)(C) (defining classes of aliens that are to be deported from the United
States).

\(^{186}\) 8 C.F.R. § 241.14(d). This includes aliens who have engaged in terrorist
§1227(a)(4)(A). Terrorist activities include: 1) inciting or committing a terrorist activity
causing serious injury or death; 2) planning terrorist activities; 3) gathering information
on potential targets; 4) soliciting funds for terrorist activities, organizations, or
organizations that the alien should know are involved in terrorist activities; or 5)
committing an act that the alien knows or should know provides material support for
others engaged in terrorist activities, including offering transportation, a safe house, false
documentation or identification, funds, or weapons. 8 U.S.C. § 1182(a)(3)(B).

\(^{187}\) 8 C.F.R. § 241.14(f). To be considered specially dangerous, an alien must have
1) committed a "Crime of Violence" under 18 U.S.C. § 16; 2) be likely to engage in acts
of violence in the future, because of a mental condition or personality disorder; and (3)
there must be "no conditions of release [that] can be reasonably expected to ensure the
safety of the public." *Id.* § 241.14(f)(i)–(iii). Crimes of violence include assault, sexual
assault, burglary, and robbery, but not narcotics offenses or accessory after the fact to a
would no doubt be considered a crime of violence and Kestutis Zadvydas’s attempted
robbery offenses may be considered crimes of violence if an element of them included
some force or attempted use of force. See *Zadvydas* v. *Davis*, 533 U.S. 678 (2001); see
also United States v *Galicia-Delgado*, 130 F.3d 518 (2d Cir. 1997) (holding that
attempted robbery falls within the definition of a "crime of violence").
implemented.\textsuperscript{188}

The determining factors for a large number of immigrants will be: 1) the requirement of a mental condition or personality disorder that makes an alien more likely to commit crimes, and 2) the requirement that there be an inability to create conditions of release that will reasonably prevent such activity.\textsuperscript{189} Having just been adopted on an interim basis, there will surely be questions regarding the meaning of these provisions and, depending on how the INS chooses to implement the regulations, additional court challenges.\textsuperscript{190}

\textbf{B. Applicability to Excludable Aliens.}

The Supreme Court in \textit{Zadvydas} explicitly avoided ruling on the constitutionality of indefinite detention of excludable aliens.\textsuperscript{191} Before that decision, the Sixth Circuit, in \textit{Rosales-Garcia v. Holland}, ruled that INA § 241(a)(c) is unconstitutional as applied to excludable aliens.\textsuperscript{192} The Supreme Court granted \textit{certiorari} in \textit{Thoms v. Rosales-Garcia}, vacated the decision, and remanded the case to the Sixth Circuit for a ruling in light of \textit{Zadvydas}.\textsuperscript{193} Below is a brief discussion of \textit{Rosales-Garcia} and a discussion of how \textit{Zadvydas} likely will affect future cases involving excludable aliens.


\textsuperscript{189} 8 C.F.R. § 241.14(f)(ii)-(iii).

\textsuperscript{190} Under the regulations considered by the Supreme Court in \textit{Zadvydas}, there were several factors to be considered by the INS in determining whether to release an alien whose deportation could not be effected. The INS essentially ignored them and detained every alien it could. If such a situation arises again and all deportable aliens convicted of crimes of violence are detained without consideration of their dangerousness and the ability to place conditions on release to prevent further violence, then the Supreme Court may face essentially the same question in determining whether there are “special circumstances” allowing for continued detention. \textit{See generally Zadvydas}, 533 U.S. 678.

\textsuperscript{191} \textit{See id.} at 696 (holding that aliens have liberty interests that raise constitutional questions but failing to rule whether indefinite detention of aliens is constitutional).

\textsuperscript{192} \textit{Rosales-Garcia v. Holland}, 238 F.3d 704, 707 (6th Cir. 2001).

I. *Thoms v. Rosales-Garcia*\(^{194}\)

a. *Facts*

In 1980, more than 120,000 undocumented immigrants left the port of Mariel, Cuba for the United States as part of the “Mariel boatlift.”\(^{195}\) Many of these Mariel Cubans were put into exclusion proceedings, but because of the mass of humanity facing the INS, most were granted humanitarian parole.\(^{196}\) Over the years since Mariel, several thousand of these paroled Mariel Cubans have found themselves on the wrong side of the law and have had their parole revoked.\(^{197}\) Cuba refuses to accept any of them back, which leaves the United States in a quandary.\(^{198}\)

Beginning in 1996, with the passage of IIRIRA, the INS started detaining excludable aliens with criminal convictions as soon as their prison sentences ended.\(^{199}\) With its new statutory authority to detain excludable aliens indefinitely, the INS did so.\(^{200}\) These excludable aliens, along with deportable aliens like Ma and Zadvydas, came to be known as “lifers” because they were held in prisons with no chance for release and no hope of deportation.\(^{201}\) By 2001, the number of lifers had reached almost 5,000, and because few, if any, were being released, their numbers were only growing.\(^{202}\) The cost of incarcerating lifers was approaching two hundred fifty million dollars per year.\(^{203}\)

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\(^{194}\) *Id.*

\(^{195}\) Rosales-Garcia v. Holland, 238 F. 3d 704, 707 (6th Cir. 2001).

\(^{196}\) *Id.* at 707. *See INA § 212(d)(5)(A), 8 U.S.C. § 212(d)(5)(A) (1994).*

\(^{197}\) *See Rosales-Garcia, 238 F.3d at 711.*

\(^{198}\) *See id.*

\(^{199}\) *See id.* at 708–09.


\(^{201}\) *Id.*

\(^{202}\) *Id.*

\(^{203}\) *See Dianne Marrero, Nowhere to Call Home, Detainees Stuck in U.S. Jails as Native Countries Refuse to Take them Back, Fl. Times-Union, Feb. 20, 2001, at A1, available at LEXIS, News Library, News Group File.* There were twenty thousand INS detainees at the time, approximately four thousand of them lifers. *Id.* The entire detention was costing taxpayers nine hundred million dollars annually. *Id.*
Mario Rosales-Garcia (Rosales) was a lifer. He came to the United States on May 6, 1980, as part of the Mariel Boatlift. He was deemed excludable and granted immigration parole.\textsuperscript{204} Subsequently, he was arrested and convicted of a number of offenses, including possession of marijuana, resisting arrest, grand theft, burglary, grand larceny, and escape from a penal institution.\textsuperscript{205} Rosales’s parole was revoked in 1986, but he was released on parole two years later in 1988.\textsuperscript{206}

Then, in 1993, Rosales was convicted of conspiracy to possess with the intent to distribute cocaine.\textsuperscript{207} He was sentenced to sixty-three months in prison to be followed by five years of supervised release.\textsuperscript{208} On March 24, 1997, while serving his sentence, his immigration parole was revoked again.\textsuperscript{209} When Rosales was released from prison on May 18, 1997, the INS took him into custody.\textsuperscript{210} Rosales was considered for immigration parole a third time on November 5, 1997, but this time parole was denied due to his “propensity to engage in recidivist criminal behavior.”\textsuperscript{211} Rosales remained in INS custody where he continued to receive yearly consideration for parole under the Cuban Review Plan.\textsuperscript{212}

\textit{b. Eastern District of Kentucky Decision}

Rosales petitioned the U.S. District Court for the Eastern District of Kentucky on July 9, 1998, for a writ of \textit{habeas corpus}.\textsuperscript{213} The district court dismissed his petition on May 3, 1999, concluding that Congress had been granted total discretion over immigration matters under the plenary power doctrine and

\textsuperscript{204} Rosales-Garcia v. Holland, 238 F.3d 704, 707 (2001).
\textsuperscript{205} \textit{Id.} at 707–08.
\textsuperscript{206} \textit{Id.} at 708.
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Id.} at 708.
\textsuperscript{210} \textit{Id} at 709.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} See \textit{Id.} (noting that Rosales-Garcia receives periodic reviews of his parole status); see also, 8 C.F.R. § 212.12 (2002) (providing that a parole review must occur within one year of denial of parole).
\textsuperscript{213} Rosales-Garcia, 238 F.3d at 709. Rosales was being held at the Federal Medical Facility in Lexington, Kentucky. \textit{Id.} at 707.
that the Constitution affords excludable aliens no greater protection than what Congress deems appropriate.\footnote{See supra text accompanying note 27.}

c. Sixth Circuit Court of Appeals Decision

Rosales appealed this decision to the Sixth Circuit Court of Appeals, which considered "whether the executive branch of the government has the authority under the United States Constitution to detain a person indefinitely without charging him with a crime or affording him a trial."\footnote{Rosales-Garcia, 238 F.3d at 715.} In a 2-1 decision, the court held that "indefinite detention of Mario Rosales-Garcia cannot be justified by reference to the government’s plenary power over immigration and that it violates Rosales’s substantive due process rights under the Due Process Clause of the Fifth Amendment."\footnote{Id. at 722–23 (citing INA § 236(e), 8 U.S.C. § 1226(e) (Supp. V 1994)). Other courts have identified other purposes for detention, including protecting the government’s ability to deport the alien and preventing the alien from fleeing prior to deportation. See, e.g., Hermanowski v. Farquaharson, 39 F. Supp. 2d 148, 149 (D. R.I. 1999), Phan v. Reno, 56 F. Supp. 2d 1149, 1155–56 (W.D. Wash. 1999), Vo v. Greene, 63 F. Supp. 2d 1278, 1285 (D. Colo. 1999).} Next, the court looked to see whether the Government’s detention was excessive in relation to its purpose of "protect[ing] society from a person who poses a danger to other persons or property."\footnote{Id. at 723–24.} The court concluded, based in part on the minimal INS review given Rosales, that the indefinite detention of excludable aliens was unconstitutionally excessive under Salerno.\footnote{Rosales-Garcia, 238 F.3d at 723–24.} The Government petitioned the Sixth Circuit for a rehearing en banc but was denied.\footnote{Rosales-Garcia v. Holland, 2001 U.S. App. LEXIS 7898 (6th Cir. 2001). Carballo v. Luttrell, No. 99-5698, 2001 U.S. App. LEXIS 21695 (6th Cir. Oct. 11, 2001).}

d. Carballo v. Luttrell

On October 11, 2001, in Carballo v. Luttrell, a panel of the Sixth Circuit ruled on a case presenting the same issue as Rosales-Garcia.\footnote{Carballo v. Luttrell, No. 99-5698, 2001 U.S. App. LEXIS 21695 (6th Cir. Oct. 11, 2001).} The panel concluded, based on the Supreme Court’s
language in Zadvydas, that Mezei was expressly upheld, and therefore, the court ruled that the indefinite detention of excludable aliens is constitutional.\(^\text{221}\) The Sixth Circuit vacated Carballo and granted a rehearing en banc to reconsider the case when, presumably, it will also resolve Rosales-Garcia.\(^\text{222}\)

e. Supreme Court Decision

In Rosales-Garcia, Government petitioned the Supreme Court for a writ of certiorari, which was granted on December 10, 2001.\(^\text{223}\) The Supreme Court vacated the appellate court decision and remanded the case for further proceedings, in light of Zadvydas.\(^\text{224}\)

f. Sixth Circuit en banc Decision

On March 5, 2003, the Sixth Circuit issued its decision in Rosales-Garcia v. Holland,\(^\text{225}\) ruling that INA § 241(a)(6) applies to Excludable aliens as it does to removable aliens. As did the Supreme Court in Zadvydas, the Sixth Circuit in Rosales-Garcia declined to reach the constitutionality of indefinite detention of removable or excludable aliens.

2. Where do we go from here?

It seems there are two routes the Circuit Courts of Appeal that have yet to rule can take. They can rely on the language in Zadvydas indicating approval and continued vitality for Mezei, or they can latch onto the analysis of the detention under Salerno and interpret the statute as applying to both excludable and deportable alien.

\(^\text{221}\) Carballo, 2001 U.S. App. LEXIS 21695, at *39-*40. As the Carballo court explained:

Although Mezei, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect . . . . His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border." . . . And that made all the difference.


\(^\text{224}\) Id.

\(^\text{225}\) 2003 FED App. 0070P (6th Cir.) (March 5, 2003)
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aliens in the same way.

The INS asserts that Zadvydas did not alter its authority to detain excludable aliens indefinitely.\textsuperscript{226} In the most recent INS regulations, the INS continues to have the same authority to detain excludable aliens, including those who have been paroled into the country, that it enjoyed before Zadvydas.\textsuperscript{227} Despite the INS’s vociferous denial that Zadvydas alters the landscape of constitutional protections afforded excludable aliens, many people of varying points of view think otherwise. It is true that Zadvydas did not specifically consider the plight of the excludable alien,\textsuperscript{228} but nonetheless, as Justices Scalia, Kennedy, Thomas, and Chief Justice Rhenquist all agree, it is inconsistent to say that INA § 241(a)(6) can be construed so as to place a reasonable time limitation on the detention of removable resident aliens and construed differently as it applies to excludable aliens.\textsuperscript{229} In addition to the dissenting justices, immigrant advocacy groups feel Zadvydas applies to excludable aliens, offering them the same protection from unreasonable detention that it grants removable aliens.\textsuperscript{230} Practitioners have said that Zadvydas is, at least, relevant

\textsuperscript{226} Greene Statement, supra note 183. “The Court’s decision does not apply to arriving aliens—those still technically at our borders and paroled in (including groups such as Mariel Cubans who are treated as still seeking admission).” Id.

\textsuperscript{227} 8 C.F.R. §§ 236.1, 241.4, 241.13 (2002). The same authority to detain indefinitely appears in § 236.1, and the same procedures for review are found in § 241.4. Id. The new section, § 241.13 states: “This section does not apply to: (i) arriving aliens, including those who have not entered the United States, those who have been granted immigration parole into the United States, and Mariel Cubans.” Id. § 241.13(b)(3). Mariel Cubans are not reviewed under the same criteria as other excludable aliens in indefinite detention; they are reviewed under a procedure set out in 8 C.F.R. § 212.12(b). Id.; see 8 C.F.R. § 212.12(b) (2002).

\textsuperscript{228} Id. at 695 (distinguishing the case of the excludable alien from that of the removable alien, denying that Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) applies). The majority stated that “aliens who have not yet gained initial admission to this country would present a very different question;” a question the court declined to answer, however. Id. at 682.

\textsuperscript{229} Id. at 710 (Kennedy, J., dissenting) (“[I]t is not a plausible construction of § [241](a)(6) to imply a time limit as to one class but not to another.”). In a separate dissent, joined by Justice Thomas, Justice Scalia states that “Mezei thus stands unexplained and undistinguished by the Court’s opinion.” Id. at 704 (Scalia, J., dissenting).

\textsuperscript{230} Chardy, supra note 183. Cheryl Little, executive director of Miami-based Florida Immigrant Advocacy Center told Knight-Ridder newspapers that “in her view [Zadvydas] covers ‘excludable aliens.’” Id.
to the issue, though others doubt *Zadvydas* in any way changes the applicability of *Mezei*. Because *Zadvydas* did not expressly apply to excludable aliens, the determination of whether their indefinite detention is permissible is, at this time, left up to the circuits.

Since *Zadvydas* was decided on June 28, 2001, courts in seven circuits, including the Sixth Circuit in *Rosales-Garcia*, have ruled on the applicability of INA § 241 to excludable aliens. Courts in the Third, Fourth, Fifth, and Seventh Circuits have ruled that indefinite detention of excludable aliens is authorized by INA § 241 and the Constitution. The Ninth Circuit in *Xi v. Immigration and Naturalization Serv.*overturned its earlier decision in *Navarro v. Immigration and Naturalization Service* on May 8, 2002, and ruled that the limitation on

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231 Marcia Coyle, *Supreme Court Trims Congress' Sails on Immigration Control*, MIAMI DAILY BUS. REV., July 11, 2001, at A10. In reacting to *Zadvydas*, attorney Seth M. Stodder of Gibson, Dunn, and Crutcher in Washington D.C. said an excludable alien "case may be back in the Supreme Court in a few years" and felt *Zadvydas* may play a role in its resolution. *Id.*


233 *Zadvydas*, 533 U.S. 678.

234 2003 FED App. 0070P (6th Cir.) (March 5, 2003).


238 Guerra v. Olson, 24 Fed. Appx. 617 (7th Cir. 2001); Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir. 2001).

239 298 F.3d 832 (9th Cir. 2002); see also Moreno-Pena v. Immigration and Naturalization Service, 2002 U.S. App. LEXIS 26412 (9th Cir. 2002).

240 Manuel Navarro v. Immigration and Naturalization Service, No. 01-15111, 2002 U.S. App. LEXIS 6538 (9th Cir. Apr. 8, 2002) (holding that *Zachvydas* did not apply to excludable aliens).
detention in INA § 241 recognized by Zadvydas also applied to excludable aliens, thus creating a split in the circuits. A district court has also held that Zadvydas requires excludable aliens to be treated the same as deportable aliens. 241

In Borrero and Xi, the courts held that, because they were applying the exact same statute being construed in Zadvydas, they were bound by the interpretation given by the Supreme Court. 242 According to the Ninth Circuit, the statute "does not draw any distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability." 243 Relying on the reasoning in Kennedy's dissent, the Court said, "it is not a plausible construction of [INA§ 241(a)(6)] to imply a time limit as to one class but not to another." 244

Due to the split in the circuits, the Supreme Court will likely feel obligated to wade back into this matter. If so, then the Court might find that one statute applies differently with different classes of aliens, allowing for indefinite detention of excludable aliens, while detaining removable aliens for a reasonable time. More likely, the Court could rule that the statute also imposes a limitation on detention of excludable aliens for a reasonable time. In addition, it would force the Court to reconsider the Mezei doctrine.

Another possible outcome would be for Congress to create different provisions for excludable aliens and deportable aliens. This approach would avoid the problem highlighted by the Zadvydas dissent and the decisions in Xi and Borrero. 245 It might still create a split in the circuits, as evidenced by Rosales-Garcia. 246 Thus, the Supreme Court would be invited to either interpret the new statute in the same manner it did in Zadvydas or


242 See id. at *18–20; see also Xi, 298 F.3d at 833-34.

243 Xi, 298 F.3d at 835. See Borrero 2001 U.S. Dist. LEXIS 212829, at *18 (The statute "clearly indicates, on its face, that it is equally applicable to both inadmissible/excludable aliens and to otherwise removable aliens.").

244 Xi, 298 F.3d at 837; Borrero 2001 U.S. Dist. LEXIS 212829 at *19 (quoting Zadvydas v. Davis, 533 U.S. 678, 710 (2001)).


rely on *Mezei* in ruling that indefinite detention of excludable aliens, if authorized by Congress, is constitutional. If Congress decides to go down this path, it may elect to tighten the wording of INA § 241 so as to mandate indefinite detention, thereby forcing the Supreme Court to decide the constitutional question. In such a scenario, the Supreme Court would be invited to rule on the constitutionality of *Mezei* and the indefinite detention of excludable aliens. Whatever the mechanism, it seems likely this issue will not go away anytime soon.

IV. Conclusion

As a nation, we see protecting our borders as a key to national security. There is disagreement in what this means and in how we should go about the process, but no one disputes that we need to bar dangerous people. Our concern over this issue has risen to the top of the political agenda recently, in the wake of the World Trade Center attacks and the revealed ineptness of the INS.247

What, then, should we do about these excludable and inadmissible aliens? With regard to new immigrants arriving at our borders and ports of entry, we should scrutinize them carefully and not admit them if we deem them to be a danger to our nation’s safety. While this may sound obvious, we have not been doing it.

For example, with the Mariel Cubans, rather than make individual inquiries when they arrived, we simply labeled large numbers who came without proper documentation as excludable and then paroled them into the country. Under the entry fiction, paroling the Mariel Cubans allowed us to remove any of these parolees at a later date. While this may sound reasonable, it did not prove to be a good policy because thousands of Mariel Cubans, many of them criminals in Cuba, committed serious crimes in this country. How can it be reasonable for the INS to determine how dangerous these individuals are by first releasing them into the population? No matter how difficult the process, surely it would have been better to make the inquiry before releasing aliens into the country, thereby sparing our citizens and visitors from danger.

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Forcing the INS to make this inquiry before physically allowing an alien entry into the country would also protect the alien from arbitrary action by the INS. Once physically present beyond the border, the alien would enjoy the constitutional protections of due process afforded other similarly situated aliens. Of course, if an alien commits a crime, it is our prerogative to deport him or her.

It is true that some cannot actually be deported and that indefinite detention is not acceptable under Zadvydas. Despite this, the INS may impose conditions of release for these undeportable and unremovable aliens; surely, it is less expensive to impose even the harshest terms of supervised release than it is to imprison these individuals. Additionally, we are not precluded from incarcerating these aliens if they commit additional crimes. We are simply precluded from incarcerating them without charging and convicting them of a crime.

In the future, if faced with the issue of indefinitely detaining excludable aliens, then the Supreme Court should strike down the entry fiction. This would force the INS to carefully scrutinize each individual trying to gain entry into the United States. It would also protect those aliens who might otherwise be labeled inadmissible and then paroled into the country by affording them the same protections granted other aliens in our country. If individuals are known to be dangerous, we should not allow them into the country at all.