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## Preserving the Essence Of *Zadvydas V. Davis* in the Midst of a National Tragedy

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# COMMENTS

## Preserving the Essence of *Zadvydas v. Davis* in the Midst of a National Tragedy

### I. INTRODUCTION

September 11, 2001, marked the beginning of a renewed cycle of tension within American society. The suicide attacks against the World Trade Center and the Pentagon define a moment in history that has once more instilled fear of anything and anyone that may disrupt the stability of America. Throughout history, the United States has suffered many similar periods of national tension that have generated paranoia of the unfamiliar. Unfortunately, society and the government deal with this tension by discriminating against those most vulnerable. Those most susceptible to discrimination are noncitizens in the United States. Whether present legally or illegally, all noncitizens are at risk of becoming targets of discrimination because of the limited rights guaranteed to them under the Constitution.

On June 28, 2001, the Supreme Court issued *Zadvydas v. Davis*,<sup>1</sup> a decision holding unconstitutional the indefinite detention of lawful resident aliens awaiting removal from the United States. This landmark decision recognized noncitizens as persons entitled to constitutional protection. After September 11, 2001, however, the progress that *Zadvydas* could have achieved in the area of indefinite detention of aliens is in danger of becoming stymied. This Comment will discuss the present status of aliens under the Constitution, specifically their status within the realm of indefinite detention. Furthermore, it will address the new preventive measures implemented by the Government in response to the terrorist attacks while considering the Supreme Court's decision in *Zadvydas v. Davis*. The Comment will also attempt to demonstrate how the tragedy of September 11 will most likely transform the latest breakthrough case in the field of alien rights into a powerful tool for discrimination against aliens as a means for the nation to deal with the tension of the current crisis produced by the terrorist attacks of September 11, 2001.

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1. 533 U.S. 678 (2001) (5-4 decision).

## II. THE IMMIGRATION AND NATIONALITY ACT

The admissibility and exclusion of foreigners from the United States is governed by the Immigration and Nationality Act (INA).<sup>2</sup> Upon acquiring a visa from the American Embassy located in his or her country of origin, an alien is able to enter the United States either as an immigrant sponsored by a family member or employer,<sup>3</sup> or as a nonimmigrant entering as a tourist or student.<sup>4</sup> If a family member or employer sponsors an alien, that alien automatically enters as a lawful permanent resident. A nonimmigrant is expected to leave the United States after a predetermined period of time. Any nonimmigrant who remains in the United States beyond the time permitted is present illegally, yet may petition for an adjustment of status, which allows a nonimmigrant to become a lawful permanent resident.<sup>5</sup>

All aliens, whether entering as immigrants or nonimmigrants, must undergo an inspection for admission after arriving at a port of entry in the United States.<sup>6</sup> The inspection for admission involves an inquiry encompassing the health related danger or criminal danger that an alien may pose to the community.<sup>7</sup> If an inspector has reason to believe that grounds exist to charge an alien as inadmissible, then the alien is not allowed to enter the United States.<sup>8</sup> From a port of entry, an inadmissible alien is detained and placed in removal proceedings.<sup>9</sup> The INA provides for a waiver of the detention of an excludable alien if the Attorney General considers it to be in the national interest to do so.<sup>10</sup> These aliens are allowed into the United States as parolees.<sup>11</sup> The status of parolee is a legal fiction because a person is physically allowed into the community, yet has not been legally admitted; therefore, a parolee is not legally present in the United States, even though he or she may live in the United States for several years.<sup>12</sup> The Attorney General may revoke parolee status at any time, thereby placing an excludable alien in

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2. Immigration and Nationality Act, 8 U.S.C. § 1101 (2000).

3. See Immigration and Nationality Act § 203, 8 U.S.C. § 1153 (2000).

4. See *id.* § 101(a)(15), 8 U.S.C. § 1101(a)(15).

5. *Id.* § 245, 8 U.S.C. § 1255.

6. *Id.* § 235(a), 8 U.S.C. § 1225(a).

7. *Id.* § 212(a), 8 U.S.C. § 1182(a).

8. *Id.*

9. *Id.* § 236(c)(1)(A), 8 U.S.C. § 1226(c)(1)(A).

10. *Id.* § 212(d)(1), 8 U.S.C. § 1182(d)(1). Specifically, the Attorney General may waive inadmissibility due to urgent humanitarian reasons or for significant public benefit. *Id.* § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

11. *Id.* § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

12. *Id.* See also Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1096 (1995).

removal proceedings.<sup>13</sup>

Any alien who is present within the United States, either lawfully or unlawfully, can be deported. Such an alien is considered deportable as opposed to excludable because he or she is present within the United States.<sup>14</sup> A lawful permanent resident or illegal alien can be placed in removal proceedings if he or she leaves the United States and upon return is found to be inadmissible.<sup>15</sup> Additionally, an alien is deemed deportable if he or she has been convicted of a criminal offense.<sup>16</sup> After serving a criminal sentence, the alien is taken into custody and placed in removal proceedings to determine whether the alien will be deported to the alien's country of origin.<sup>17</sup>

Although categorized separately under the INA, both deportable and excludable aliens must undergo the same removal proceedings under section 240 of the INA.<sup>18</sup> Once an alien is charged with either inadmissibility or deportability, the alien appears before an immigration judge who decides whether to exclude or deport the alien based on evidence and witness testimony.<sup>19</sup> An alien in removal proceedings has a right to counsel, an opportunity to cross-examine adverse witnesses, and an opportunity to examine the evidence against him or her, with the exception of national security information.<sup>20</sup> If an immigration judge finds the alien to be excludable or deportable, the alien is ordered removed and is detained under section 241 of the INA.<sup>21</sup> An order of removal is not subject to judicial review.<sup>22</sup>

The arrangements for removal from the United States must take place within ninety days from the date of the order for removal, which is called the removal period.<sup>23</sup> During the ninety-day removal period, no alien can be released from detention.<sup>24</sup> Under the INA, an alien may be

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13. Immigration and Nationality Act §§ 212(d)(5)(A) & 236(b), 8 U.S.C. § 1226(b) (2000).

14. *Id.* § 237(a), 8 U.S.C. § 1227(a).

15. *Id.* § 237(a)(1), 8 U.S.C. § 1227(a)(1).

16. *Id.* § 237(a)(2), 8 U.S.C. § 1227(a)(2). Such criminal offenses include crimes of moral turpitude, controlled substance possession, domestic violence, and aggravated felonies as defined in section 101(a)(43) of the Immigration and Nationality Act. *Id.* Compare Immigration and Nationality Act § 212(a)(2), 8 U.S.C. § 1182 (a)(2) (2000), with Immigration and Nationality Act § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2000) (noting that although the types of crimes listed under the deportability section of the INA are similar to the crimes in the excludability section, the gravity of the offenses are more severe in the deportability section).

17. *Id.* § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B).

18. *Id.* § 240(a)(2), 8 U.S.C. § 1229a(a)(2).

19. *Id.* § 240(b)(1), 8 U.S.C. § 1229a(b)(1).

20. *Id.* § 240(b)(4), 8 U.S.C. § 1229a(b)(4).

21. *Id.* § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A).

22. *Id.* § 242(a)(2), 8 U.S.C. § 1252(a)(2).

23. *Id.* § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A).

24. *Id.* § 241(a)(2), 8 U.S.C. § 1231(a)(2).

detained beyond the ninety-day removal period if the alien fails to make arrangements for his or her departure.<sup>25</sup> Most important for reasons of the present analysis, however, is section 241(a)(6), which allows the Attorney General to detain beyond the removal period any criminal alien considered a "risk to the community or unlikely to comply with the order of removal."<sup>26</sup> Although an order of removal is not subject to judicial review,<sup>27</sup> issues of indefinite detention have reached the courts through aliens' petitions for writs of habeas corpus, claiming wrongful detention beyond the removal period. Within the context of habeas petitions, courts have been able to define the due process rights that aliens are entitled to within the area of indefinite detention.

### III. THE JUDICIAL INTERPRETATION OF THE DUE PROCESS RIGHTS OF ALIENS

Aliens do not enjoy the same rights as United States citizens. Moreover, constitutional rights differ among the different categories of aliens. Throughout history, the Supreme Court has solidified the notion that deportable aliens enjoy more due process rights than excludable aliens.<sup>28</sup> In essence, an alien's right to procedural due process depends on the alien's location:<sup>29</sup> if an alien is within United States territory, then the alien is entitled to some due process, but if the alien is considered outside the territory, the alien has no due process rights.<sup>30</sup>

#### A. *The Plenary Power Doctrine*

The Supreme Court has justified the limited procedural rights of deportable aliens and the lack of rights of inadmissible aliens under the plenary power doctrine.<sup>31</sup> The plenary power doctrine is based on the belief that citizens are responsible for choosing the composition of the national community, and therefore Congress, as the community's representative, has full power to determine immigration policy.<sup>32</sup> The Court deems matters concerning immigration law to be within the sole discretion of the political branches,<sup>33</sup> and limits its role to ensuring that a minimum standard of due process is met without imposing procedures that

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25. *Id.* § 241(a)(1)(C), 8 U.S.C. § 1231(a)(1)(C).

26. *Id.* § 241(a)(6), 8 U.S.C. § 1231(a)(6).

27. *Id.* § 242(a)(2)(A)(i), 8 U.S.C. § 1252(a)(2)(A)(i).

28. Taylor, *supra* note 12, at 1095.

29. Michael Scaperlanda, *Are We that Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 24 (1996).

30. *Id.*

31. Taylor, *supra* note 12, at 1128.

32. See Scaperlanda, *supra* note 29, at 24.

33. Taylor, *supra* note 12, at 1128.

displace congressional policy choices.<sup>34</sup> The history of the plenary power doctrine has its roots in the nineteenth century when the Supreme Court upheld discriminatory restrictions imposed on Chinese immigrants through the Chinese Exclusion Act.<sup>35</sup> Although due process rights have expanded overall in the past one hundred years, consideration of due process rights for aliens in the area of immigration law remains underdeveloped.<sup>36</sup>

The Supreme Court's decision in *United States ex rel. Knauff v. Shaughnessy* demonstrates the Court's use of the plenary power doctrine to deny due process rights to excludable aliens.<sup>37</sup> In *Knauff*, the German wife of a United States citizen was excluded from entering the United States because of security reasons.<sup>38</sup> The government suspected that Knauff's admission would be prejudicial to the interests of the United States and excluded Knauff without a hearing.<sup>39</sup> The government kept the exclusion charges confidential.<sup>40</sup> The issue before the Supreme Court was whether the Attorney General could exclude Knauff without a hearing.<sup>41</sup> According to the Court, entry into the United States is a privilege, not a right,<sup>42</sup> and Congress's authorized procedure for entry is the extent of due process afforded to an alien seeking admission.<sup>43</sup> Because Congress delegated the power to exclude to the executive, the delegated party's decision is final and conclusive, allowing no judicial review of the decision.<sup>44</sup> In *Knauff*, the confidential nature of the information against Knauff justified the Attorney General's decision to exclude the alien without a hearing.<sup>45</sup>

The Court especially has invoked the plenary power doctrine when deciding issues concerning the detention of aliens. Shortly after the Supreme Court's decision in *Knauff*, the Court reviewed the issue of indefinite detention of aliens in *Shaughnessy v. United States ex rel. Mezei*.<sup>46</sup> In *Mezei*, a Romanian citizen was confined on Ellis Island for a

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34. Scaperlanda, *supra* note 29, at 24 (citing *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (finding that a lawful permanent resident alien can lose his protected status if absence from the United States is extended)).

35. Taylor, *supra* note 12, at 1128.

36. *See id.* at 1129.

37. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

38. *Id.* at 539-40.

39. *Id.* at 540.

40. *Id.* at 544.

41. *Id.* at 540.

42. *Id.* at 542.

43. *Id.* at 544.

44. *Id.* at 543.

45. *Id.* at 544.

46. 345 U.S. 206, 207 (1953).

period of twenty-one months with no definite removal date.<sup>47</sup> Mezei had lived in the United States from 1923 to 1948, but was denied re-entry after a two-year trip to Romania to visit his sick mother.<sup>48</sup> The Attorney General ordered the exclusion without a hearing based on confidential information concerning Mezei, the disclosure of which would be prejudicial to the public interest.<sup>49</sup> After Mezei filed several habeas corpus petitions, the Court of Appeals affirmed the district court's order releasing Mezei on conditional parole.<sup>50</sup> Under the plenary power doctrine, however, the Supreme Court held that the power of the Attorney General to exclude is unquestionable.<sup>51</sup>

According to the Court, Mezei was not entitled to a hearing because aliens are only entitled to as much due process as Congress deems appropriate.<sup>52</sup> Furthermore, allowing Mezei to be released on parole was irrational since the Attorney General had certified Mezei as a security risk.<sup>53</sup> Because Mezei was an entering alien, regardless of his previous residency in the United States, the Attorney General had a right to order Mezei's exclusion without a hearing and to detain him indefinitely based on security-related evidence.<sup>54</sup>

*Knauff* and *Mezei* are the seminal cases regarding the constitutional rights and detention of aliens. The Ninth Circuit Court of Appeals followed Supreme Court precedent on the matter in *Barrera-Echavarria v. Rison*.<sup>55</sup> *Barrera-Echavarria* involved an excludable Cuban detainee with no prospects of repatriation to Cuba.<sup>56</sup> The district court granted the detainee a writ of habeas corpus that the Ninth Circuit Court of Appeals later reversed.<sup>57</sup> Relying on *Knauff* and *Mezei*, the Ninth Circuit reasoned that aliens had no right to be free from detention.<sup>58</sup> It based its conclusion on the principle that excludable aliens are not entitled to any procedural due process rights at all.<sup>59</sup> As seen in *Knauff*, *Mezei*, and *Barrera-Echavarria*, the plenary power doctrine reigns within the area of admission and exclusion of aliens. The doctrine justi-

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47. *Id.* at 207-09.

48. *Id.* at 208.

49. *Id.*

50. *Id.* at 209.

51. *Id.* at 210-11.

52. *Id.* at 212.

53. *Id.* at 216.

54. *Id.* at 212-13.

55. 44 F.3d 1441, 1447 (9th Cir. 1995).

56. *Id.* at 1442.

57. The Ninth Circuit had originally affirmed the issuance of the writ, 21 F.3d 314 (9th Cir. 1994), but later reversed on rehearing. 44 F.3d 1441 (9th Cir. 1995) (en banc).

58. *Barrera-Echavarria*, 44 F.3d at 1448.

59. *Id.* at 1449.

fies the courts in allowing Congress to create policies within immigration law that limit the due process rights of aliens.

### B. *The Aliens' Rights Tradition*

Another tradition within the Supreme Court's jurisprudence, however, has operated parallel to the plenary power doctrine. The aliens' rights tradition, contrary to the plenary power doctrine, considers aliens as persons entitled to the same due process rights as citizens. The aliens' rights tradition cases, unlike the plenary power doctrine cases, have dealt with issues that concern aliens present in the United States, and have not dealt with the admission and exclusion issues of immigration law. The aliens' rights tradition, nevertheless, has played an important role in advocating the rights of all aliens.

The first cases within the aliens' rights tradition involved discriminatory practices against Chinese aliens. In *Yick Wo v. Hopkins*,<sup>60</sup> for example, a San Francisco, California ordinance ordered the closing of over two-hundred laundry establishments owned by lawful permanent resident Chinese, while eighty similar establishments owned by United States citizens remained operative. One Chinese alien was detained for failing to abide by the ordinance. The Supreme Court reviewed whether Chinese aliens were entitled to equal protection under the Fourteenth Amendment. The Court ultimately held that Chinese aliens were entitled to Fourteenth Amendment due process protections and that the ordinance violated the due process rights of the Chinese aliens.<sup>61</sup> The only purpose of the ordinance, according to the Court, was to discriminate against the Chinese laundry owners on account of race and nationality.<sup>62</sup> The Fourteenth Amendment, therefore, applies to persons in general, not to citizens exclusively.<sup>63</sup>

The Court likewise advanced the aliens' rights tradition in *Wong Wing v. United States*.<sup>64</sup> An 1888 federal act contained a provision authorizing the detention of illegally present Chinese aliens in the United States.<sup>65</sup> The aliens' imprisonment sentence was hard labor, to last for a period not exceeding one year before removal,<sup>66</sup> and their detention was effectuated without a trial by jury.<sup>67</sup> The Supreme Court struck down the act holding that while arrest, detention, and deportation

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60. 118 U.S. 356 (1886).

61. *Id.* at 367.

62. *Id.* at 374.

63. *Id.* at 373.

64. 163 U.S. 228 (1896).

65. *Id.* at 229.

66. *Id.* at 233.

67. *Id.* at 234.



were all acceptable actions within Congress's power,<sup>68</sup> Congress does not have the right to inflict punishment and deprivation of property and liberty without a trial by jury.<sup>69</sup> According to the Court, the lack of procedural due process in this instance went beyond the constitutional sphere of legislative power.<sup>70</sup>

Although the aliens' rights tradition cases are significant in recognizing that aliens are entitled to due process rights, the aliens' rights tradition has never taken a definitive shape that could viably counter the plenary power doctrine.<sup>71</sup> The aliens' rights tradition cases merely suggest that aliens are entitled to equal protection and due process only to the extent of Congress's power to admit, exclude, or deport aliens. Therefore, a definitive boundary exists between the plenary power doctrine and the aliens' rights tradition based on issues that fall either inside or outside Congress's power in creating immigration policy. Under the aliens' rights tradition, other than its plenary power in immigration issues, Congress cannot afford aliens present in the United States less due process than United States citizens. In short, the level of an alien's due process depends on whether the alien is attempting to enter the United States or whether the alien is legally or illegally present within the United States.

### C. *The Convergence of the Plenary Power Doctrine and the Aliens' Rights Tradition*

While *Knauff* and *Mezei* upheld the plenary power of Congress in immigration matters, these cases have been criticized for their sweeping language regarding the general constitutional status of aliens when the sole question in both cases involved Congress's power to admit and exclude.<sup>72</sup> Other cases, such as *Mathews v. Diaz*,<sup>73</sup> have applied the plenary power doctrine to matters outside immigration, which has not only led to confusion between the two doctrines, but has also led to an unfortunate limitation of due process rights of aliens present within the United States.

In *Mathews v. Diaz*, the Supreme Court upheld a statute denying Medicare benefits to those lawful permanent residents who had lived in the United States for less than five years.<sup>74</sup> The Court reasoned that not all aliens are entitled to enjoy the advantages of citizenship such as

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68. *Id.* at 237.

69. *Id.*

70. *See id.*

71. Taylor, *supra* note 12, at 1135.

72. *Id.* at 1132.

73. 426 U.S. 67 (1976).

74. *Id.*

receiving federal benefits.<sup>75</sup> It was therefore reasonable for Congress to make an alien's eligibility depend on both the character and duration of his residency.<sup>76</sup> The *Mathews* decision, however, is criticized by many as a misuse of the plenary power doctrine, transforming a case involving eligibility for government benefits into a case concerning admissibility and exclusion.<sup>77</sup> *Mathews v. Diaz* is just one of the many cases that has failed to delineate the boundary between the plenary power doctrine and the aliens' rights tradition.<sup>78</sup> In effect, no consistent precedent exists to determine when aliens are entitled to constitutional protection.<sup>79</sup>

Ironically, the same convergence of doctrines also has led to the advancement of aliens' due process rights. For example, *Jean v. Nelson*<sup>80</sup> is a monumental case within the aliens' rights tradition that disregarded the plenary power doctrine in dealing with an immigration matter. During the explosion of immigration to South Florida from Cuba and Haiti in the 1980s, the Immigration and Naturalization Service was forced to release aliens on parole due to administrative difficulties.<sup>81</sup> Many Cubans were granted parole, but Haitians were ordered detained until the processing of their status.<sup>82</sup> Haitians claimed that their detention constituted national origin discrimination, considered unlawful under the equal protection clause.<sup>83</sup> In *Jean*, an Eleventh Circuit panel held that the detention policy with regard to Haitians was discriminatory.<sup>84</sup> In reaching this decision, the panel concluded that the Haitians' claims in no way relate to Congress and the executive branch's authority over immigration. In short, the panel decision invigorated the aliens' rights tradition in determining that the INS could not discriminate among aliens based on nationality. Applying *Mezei*, the Eleventh Circuit, en banc, vacated the panel decision, holding that the plenary power doctrine should govern.<sup>85</sup> The ultimate success of *Jean v. Nelson*, therefore, was shortlived and the progress that the case could have contributed to the aliens' rights tradition was truncated.

The case of *Lynch v. Cannatella*<sup>86</sup> likewise brought the aliens'

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75. *Id.* at 78.

76. *Id.* at 78-79.

77. Taylor, *supra* note 12, at 1138.

78. *Id.* at 1138-39.

79. *Id.* at 1139.

80. 711 F.2d 1455 (11th Cir. 1983).

81. *See generally id.* at 1462-65.

82. *Id.* at 1462-65.

83. *Id.* at 1468; *see also* Louis v. Nelson, 544 F. Supp. 973, 1000 (S.D. Fla. 1982).

84. 711 F.2d at 1509.

85. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984). The Supreme Court refused to reach the constitutional question on prudential grounds. *Jean v. Nelson*, 472 U.S. 846 (1985).

86. 810 F.2d 1363 (5th Cir. 1987).

rights tradition to an immigration case. *Lynch*'s progress, like *Jean*'s in the panel decision, was curtailed due to a distortion and misinterpretation of *Lynch*'s holding by later cases.<sup>87</sup> In *Lynch*, harbor police officials mistreated Jamaican stowaways upon discovering the aliens' plan to enter the United States illegally.<sup>88</sup> The Fifth Circuit Court of Appeals used *Yick Wo* and *Wong Wing* to hold that the claims of aliens held in detention could be decided under the aliens' rights tradition.<sup>89</sup> According to the court, the alien stowaways were entitled to Fifth and Fourteenth Amendment protections.<sup>90</sup> Although the court acknowledged that the status of aliens under the Constitution was different from that of citizens,<sup>91</sup> the court nevertheless held that these aliens were still entitled to constitutional protection as persons.<sup>92</sup> The alien stowaways, therefore, should be free from gross physical abuse at the hands of federal officials.<sup>93</sup>

Subsequent cases, however, misinterpreted *Lynch* and created a "gross physical abuse" exception to the general denial of due process rights to excludable aliens.<sup>94</sup> In all other instances, an excludable alien is not afforded any rights. In other words, subsequent cases upheld the plenary power doctrine by narrowing the holding of *Lynch* and interpreting the case to stand for the exact opposite of what *Lynch* was attempting to achieve under the aliens' rights tradition.<sup>95</sup> As a result, the progress forged in the aliens' rights tradition was abandoned, giving way to a standard that actually limits the rights of aliens to challenge the conditions of their confinement.<sup>96</sup>

The recent Supreme Court decision of *Zadvydas v. Davis*,<sup>97</sup> concerning the indefinite detention of permanent resident aliens, is another case in the line of *Jean* and *Lynch* that has contributed to the aliens' rights tradition. Factually, *Zadvydas* is significant because for the first time the Supreme Court dealt with the fate of a deportable alien as opposed to an excludable alien. Most significant, however, is *Zadvydas*'s doctrinal impact, extending to all persons the right to be free from indefinite detention. While asserting the rights of aliens, *Zadvydas*

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87. See generally Taylor, *supra* note 12.

88. *Lynch*, 810 F.2d at 1367.

89. *Id.* at 1373.

90. *Id.* at 1374.

91. *Id.* at 1373.

92. *Id.* at 1372.

93. *Id.* at 1374.

94. Taylor, *supra* note 12, at 1148-50.

95. *Id.* (referring to *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990); *Medina v. O'Neill*, 838 F.2d 800 (5th Cir. 1988)).

96. Taylor, *supra* note 12, at 1155.

97. 533 U.S. 678 (2001) (5-4 decision).

also contains language that can limit its holding to deportable aliens only. As a result of this dicta, *Zadvydas* runs the risk of becoming as misconstrued as *Lynch v. Cannatella*. Unfortunately, the essence of *Zadvydas* is in danger because of the national tragedy produced by the September 11 terrorist attacks.

#### IV. ZADVYDAS v. DAVIS

Under the INA, the Attorney General may detain an alien beyond the ninety-day removal period during which an alien must arrange for his or her departure from the United States.<sup>98</sup> *Zadvydas v. Davis*, however, presents the quandary of an alien who cannot return to his or her country of origin because of the lack of a repatriation agreement between the country of origin and the United States. In cases such as these, an alien remains in detention for an indefinite period of time, often for a period longer than the criminal sentence for which the deportable alien was ordered removed. Considering that immigration proceedings and detention are civil and not criminal in nature, the inflexibility of the INA in its reluctance to release removable aliens places the deportable alien in a predicament.

*Zadvydas* consolidated two cases that represented a split in the circuit courts concerning this indefinite detention issue.<sup>99</sup> Kestutis Zadvydas, born in Germany of Lithuanian parents, came to the United States at the age of eight.<sup>100</sup> He became a lawful permanent resident, and acquired a criminal record for drug crimes, attempted robbery, attempted burglary, and theft.<sup>101</sup> After serving a sixteen-year sentence, the INS ordered Zadvydas deported to Germany.<sup>102</sup> Germany, however, refused to accept Zadvydas.<sup>103</sup> Zadvydas tried to obtain Lithuanian citizenship through his parents' citizenship, but that petition was likewise rejected, as was the petition to the Dominican Republic, the country of his wife's citizenship.<sup>104</sup> Kestutis Zadvydas petitioned for a writ of habeas corpus after being held in detention beyond the ninety-day statutory removal period.<sup>105</sup> The second case concerned Kim Ho Ma, a Cambodian who immigrated to the United States at the age of seven.<sup>106</sup> Like Zadvydas, Ma was convicted for criminal acts, including a gang-

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98. Immigration and Nationality Act § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2000).

99. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (5-4 decision).

100. *Id.* at 684.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 684-85.

106. *Id.* at 685.

related shooting and manslaughter, resulting in his service of a two-year prison sentence.<sup>107</sup> He was subsequently ordered deported to Cambodia.<sup>108</sup> Ma was also held beyond the ninety-day removal period.<sup>109</sup>

Both Zadvydas and Ma are lawful permanent residents who were ordered deported after completing their criminal sentences. Both were held beyond the statutory period for removal, and both petitioned for writs of habeas corpus. When deciding the same question as to whether lawful permanent residents could be held in custody for an indefinite period of time pending removal, however, the Fifth Circuit and the Ninth Circuit arrived at two different conclusions.

The Ninth Circuit in *Ma v. Reno*<sup>110</sup> held that the INS only had the authority to detain aliens for a reasonable time beyond the statutory removal period of ninety days.<sup>111</sup> If there is no reasonable likelihood that a foreign government will accept an alien in the reasonably foreseeable future, then the alien must be released subject to the supervision procedures outlined in the INA.<sup>112</sup>

The Fifth Circuit in *Zadvydas v. Underdown*,<sup>113</sup> on the other hand, held that the Government has the authority to detain a resident alien based on his or her danger to the community or flight risk, as long as efforts to effectuate removal are made and periodic review procedures are in place.<sup>114</sup> Although a country might not accept an alien, detention beyond the ninety-day statutory removal period would not constitute unconstitutional punishment.<sup>115</sup> According to the Fifth Circuit, the detention of such an alien could be considered a necessary by-product of the need to expel an unwanted alien, instead of a punitive action.<sup>116</sup>

Because of the different conclusions involving the same indefinite detention issue, the Supreme Court granted certiorari in *Zadvydas v. Davis*.<sup>117</sup> Under section 241(a)(6) of the INA, the Court held that an alien who has been ordered removed from the United States cannot be detained for more than six months after a ninety-day statutory removal period if there is no possibility that the alien will be removed within the

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107. *Id.*

108. *Id.* at 685-86.

109. *Id.* at 685.

110. 208 F.3d 815 (9th Cir. 2000).

111. *Id.* at 821-22.

112. *Id.* at 827. The Ninth Circuit indicated that they did not reach the constitutional question as to whether indefinite detention is a violation of due process. The court chose simply to construe the statute. *Id.*

113. 185 F.3d 279 (5th Cir. 1999).

114. *Id.* at 297.

115. *Id.* at 290.

116. *Id.*

117. 533 U.S. 678, 686 (2001) (5-4 decision).

reasonably foreseeable future.<sup>118</sup> After a six-month detention period, a removable alien may be released under strict supervision.<sup>119</sup> This decision extended due process rights to aliens in the area of indefinite detention where aliens have traditionally been denied the right to be free from indefinite detention.<sup>120</sup> Throughout the majority opinion, the Court dispensed the same arguments that had traditionally justified the Attorney General's power to detain removable aliens indefinitely in order to validate its innovative interpretation of the detention statute.<sup>121</sup>

Justice Breyer began the majority opinion by asserting the Court's jurisdiction to hear the consolidated cases under habeas corpus proceedings.<sup>122</sup> Both the *Ma* and the *Zadvydas* decisions below originated from writs of habeas corpus.<sup>123</sup> The Court further asserted jurisdiction in reviewing the instant deportation orders because the petitioners were not challenging the Attorney General's discretion within the statute to detain an alien indefinitely,<sup>124</sup> but rather challenging the extent of the Attorney General's authority under the statute.<sup>125</sup>

On the merits, the Court first referred to the post-removal statute that allows the Attorney General to detain an alien who has been ordered removed from the United States beyond the removal period.<sup>126</sup> In response to the Government's argument imposing a literal interpretation of the statute, the Court recognized that the case involved a serious constitutional question.<sup>127</sup> The Court invoked a "cardinal principle of statutory interpretation," and chose to interpret the statute while avoiding the constitutional issue.<sup>128</sup>

118. *Id.* at 701.

119. *Id.*

120. *See, e.g.,* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Barrera-Echavarría v. Rison*, 44 F.3d 1441 (9th Cir. 1995).

121. *See* Immigration and Nationality Act § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2000):

An 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 in paragraph 3.

122. *Zadvydas*, 533 U.S. at 687-88.

123. Congress restricted judicial review of immigration matters in 1996, allowing questions of detention to reach the courts only through petitions for writs of habeas corpus. *See id.*

124. *See* Immigration and Nationality Act § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2000).

125. *Zadvydas*, 533 U.S. at 687.

126. *Id.* at 688. The types of removable aliens that the statute refers to include:

inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

*Id.* (citing Immigration and Nationality Act § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2000)).

127. *Id.* at 689.

128. *Id.* The Court usually invokes a "cardinal principle of statutory interpretation" whereby a

The acknowledgment of a constitutional problem in this case is significant because the Court recognized that aliens subject to deportation are entitled to protection as persons, despite precedent that justified indefinite detention. In other words, the Court acknowledged the detainees as persons rather than as aliens possessing limited constitutional rights. Its clarification of an alien's due process rights set the stage for the Court's ultimate holding—the creation of the six-month reasonable detention period. The Court reasoned that it was more favorable to construe a limitation within a statute than to invalidate it,<sup>129</sup> and limited the Attorney General's power to detain indefinitely.<sup>130</sup>

The Government next contended that the statute allowing indefinite detention of removable aliens performed a dual purpose that the Court should consider.<sup>131</sup> First, the Government argued that the statute ensures that flight-risk aliens would attend future immigration proceedings.<sup>132</sup> Second, the statute implemented a safeguard against releasing dangerous aliens into the community.<sup>133</sup> The Court, however, discarded the Government's interpretation of the statute's regulatory goals, reasoning that where removal is unattainable, a risk of flight is unlikely.<sup>134</sup> Furthermore, it noted that the statute applies to other aliens besides those who present a danger to the community.<sup>135</sup> The Court clarified that deportation proceedings were not criminal but civil proceedings, and that detention of removable aliens is not punitive in nature. In characterizing deportation proceedings as civil proceedings, and in highlighting the statute's applicability to removable aliens beyond those who have committed aggravated felonies, the Court undermined the element of danger relied upon by the Government. Eliminating the element of danger was a key component of the Court's rationale for creating a reasonable six-month detention period that could justify the release of detained aliens without fear of danger to the community.

This reasonable detention period further evolved from the notion of the difference between excludable aliens and deportable aliens.<sup>136</sup>

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Court must first interpret the statute in such a way as to avoid the constitutional question when an Act of Congress raises a constitutional inquiry. *Id.* (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

129. *Id.*

130. *Id.*

131. *Id.* at 690.

132. *Id.* (citing Brief for Respondents, No. 99-7791, at 24).

133. *Id.* at 690-91.

134. *Id.* at 690 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)).

135. *Id.* at 691.

136. "We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question." *Id.* at 682.

Although *Mezei* was the seminal case justifying the Attorney General's power to detain removable aliens for an indefinite period, the Court distinguished it based on the difference between aliens who have not been admitted to the United States and those removable aliens who have been admitted and become permanent residents. *Mezei* was an alien who had lived in the United States for twenty-five years, but was found excludable after undergoing inspection for admissibility upon his return to the United States.<sup>137</sup> Therefore, he was classified as an excludable alien and not as a deportable alien.<sup>138</sup> As an excludable alien, *Mezei* was considered not to have "entered" the United States although he was physically present in United States territory.<sup>139</sup> Because Kim Ho Ma and Kestutis Zadvydas were classified as deportable aliens rather than as excludable aliens, the Court limited *Mezei* to its facts, and easily disposed of the Government's leading case involving the indefinite detention of aliens.<sup>140</sup>

A further justification for limiting the Attorney General's statutory power involved the legislative and executive branches' plenary power in immigration matters and the Supreme Court's traditional role of deferring to the political branches.<sup>141</sup> According to the *Zadvydas* Court, however, plenary power is not so plenary, and is therefore subject to limitations.<sup>142</sup> The Court construed the statute's use of the word "may" to allow the Attorney General discretion in deportation matters. The Attorney General's power in deciding the period of detention, however, was neither absolute nor unlimited.<sup>143</sup> The judiciary, therefore, can review a deportation order without undermining the traditional judicial deference to the other branches in immigration matters because the issue is not whether Congress has the right to remove aliens.<sup>144</sup> Congress's power in creating immigration legislation is undisputed;<sup>145</sup> the issue on review was whether the Attorney General can detain an alien for an

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137. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216-17 (1953) (Black, J., dissenting).

138. *Id.* at 207.

139. *Id.*

140. Notwithstanding *Mezei*, the Court recognized that aliens, whether excludable or deportable, are entitled to due process rights if they are physically present in the United States, see *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Wong Wing v. United States*, 163 U.S. 228 (1896), although circumstances may modify the nature of due process safeguards for such aliens. See *Landon v. Plasencia*, 459 U.S. 21 (1982).

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

142. *Id.* (referring to *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

143. In reading the word "may" and Congress's unclear intent, the Court looked to another part of the INA to find Congress's clear intent regarding terrorists. *Id.* at 697 (quoting Immigration and Nationality Act § 507(b)(2)(C), 8 U.S.C. § 1537(b)(2)(C)(2000)).

144. *Id.* at 695.

145. *Id.*



indefinite period.<sup>146</sup>

After discarding the rest of the Government's arguments,<sup>147</sup> the Court established that the statute did not permit continued detention when removal was no longer "reasonably foreseeable." In creating a six-month limit to the detention period the Court provided a framework for habeas courts to follow. If the alien has yet to be deported after six months of detention, then the alien has the burden to show that there is no significant likelihood of removal in the reasonably foreseeable future. The Government must then respond with evidence sufficient to rebut the alien's proof. If the court finds that removal is not likely within the reasonably foreseeable future, then it must determine whether the alien is a flight risk or poses a threat to the community.<sup>148</sup> After establishing a framework for habeas courts, the Supreme Court then remanded both cases to the circuit courts for application of this new framework.<sup>149</sup> On remand, the Ninth Circuit rewrote its opinion to reflect the Supreme Court's "reasonably foreseeable" six-month standard.<sup>150</sup> The Fifth Circuit changed its original disposition and granted Kestitus Zadvydas habeas relief based on the Supreme Court's standard.<sup>151</sup>

In his dissent, Justice Kennedy criticized the Court for overstepping its bounds and for improperly evading its traditional judicial role.<sup>152</sup> Justice Kennedy first condemned the majority for erroneously overlooking the statutory purpose of protecting the community from dangerous individuals.<sup>153</sup> Furthermore, placing the burden on the alien to show that removal is unforeseeable will give the alien little incentive to prove that his removal is within the foreseeable future.<sup>154</sup> Although Kennedy admitted that there is a serious constitutional question embedded in the area of indefinite detention, he noted that the Court must not ignore laws which are meant to govern alien status within the United States.<sup>155</sup> Therefore, Justice Kennedy did recognize the existence of due process

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146. *Id.*

147. The Government further argued that release was an exception to the general rule of detention, and that the history of the statute supported indefinite detention.

148. In providing this framework, the Court did not intend that every alien should be released after six months; an alien has the burden of showing that there is no significant likelihood of removal in the foreseeable future. *Zadvydas*, 533 U.S. at 700.

149. Although the Court arrived at a conclusion that was reconcilable with the Ninth Circuit's decision, the Court remanded to the Ninth Circuit because its conclusion may have rested solely upon the absence of a repatriation agreement between the United States and Cambodia, instead of an assessment of the likelihood of future negotiations between the two countries. *Id.*

150. *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001).

151. *Zadvydas v. Davis*, 285 F.3d 398, 404 (5th Cir. 2002).

152. *Zadvydas*, 533 U.S. at 706 (Kennedy, J., dissenting).

153. *Id.* at 707.

154. *Id.*

155. *Id.* at 708.

rights and acknowledged an alien's right to be free from arbitrary or capricious detention. Limiting an alien's due process rights, however, is not arbitrary when doing so is necessary to avoid the risk of the alien's flight, or the alien's danger to the community.

Justice Scalia's dissent, on the other hand, failed to recognize any constitutional rights for removable aliens.<sup>156</sup> He criticized the majority for creating a constitutional right of release from detention for aliens who have already been ordered removed and have lost the right to remain in the United States.<sup>157</sup> Most notable is Justice Scalia's discussion of the majority's use of *Mezei*. According to Justice Scalia, the Court erred in distinguishing between deportable aliens in the instant case and excludable aliens in *Mezei*.<sup>158</sup> The cases are similar because both involve aliens who had lost the right to be in the United States.<sup>159</sup> Justice Scalia argued, moreover, that section 241(a)(6) of the INA grants the authority to detain both classes of aliens, thereby making the Court's distinction between deportable and excludable aliens irrational and misplaced.<sup>160</sup>

#### V. LEGISLATIVE AND EXECUTIVE REACTION TO SEPTEMBER 11, 2001, IN LIGHT OF *ZADVYDAS v. DAVIS*

After a long history of denying constitutional protections to aliens under the guise of the plenary power doctrine, *Zadvydas* is a breakthrough decision within the Supreme Court's immigration jurisprudence.<sup>161</sup> Deemed the first in a "new era of immigrants' rights,"<sup>162</sup> the Court effectively discarded the strongest arguments for limiting constitutional protections of aliens that had been justified by Congress's plenary power to detain immigrants indefinitely. For the first time, the Supreme Court acknowledged that noncitizens are entitled to the same protections as citizens.<sup>163</sup> After the Court's ruling on June 28, 2001, the Immigration and Naturalization Service (INS)<sup>164</sup> reported that 3,399 detainees could be eligible for release under the new six-month reasonably foreseeable standard.<sup>165</sup> Hundreds of potential beneficiaries of *Zadvydas* included detainees from countries that lacked repatriation agreements

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156. *Id.* at 703 (Scalia, J., dissenting).

157. *Id.*

158. *Id.* at 704.

159. *Id.*

160. *Id.* at 705.

161. David Cole, *A Legal Breakthrough for Immigrants*, N.Y. TIMES, July 1, 2001, at A13.

162. *Id.*

163. *Id.*

164. On February 28, 2003, the INS ceased to exist and became part of the new Bureau of Citizenship and Immigration Services within the Department of Homeland Security.

165. Alfonso Chardy, *Long-Term Detention Unconstitutional, but . . . INS Allows "Special*

with the United States, such as Cuba, Laos, Cambodia, and Vietnam.<sup>166</sup>

While the *Zadvydas* decision provided renewed optimism for many detainees, September 11, 2001, clouded any hope for a promising new chapter within immigration law. The terrorist attack on the World Trade Center and the Pentagon was not only an attack on United States soil, but also an attack on the psyche of the American people. A distortion of religious views led aliens from the Middle East to commit suicide attacks, killing Americans and citizens from many parts of the world. Hours after the tragedy, the American people first learned that the lives of innocent victims had been irrationally sacrificed because of foreign-based animosity towards the United States. That moment sparked a renewed cycle in anti-immigrant sentiment, leading to widespread paranoia that will perhaps curb any progress that *Zadvydas* achieved within the aliens' rights tradition.

In the aftermath of September 11, and in the subsequent debate on civil rights, *Zadvydas* is regarded as prophetic because many of the concerns elucidated in the opinion reflect the current debate on aliens' rights versus national security.<sup>167</sup> The majority opinion contains language that can be construed as an exception to the Court's reasonably foreseeable six-month standard. For example, while condemning the potential erosion of civil rights due to the indefinite detention of deportable aliens, the Court clarified that its decision was not necessarily applicable in "special circumstances."<sup>168</sup> Explicitly referring to terrorism, the Court acknowledged that deference must be given to the political branches in matters involving foreign policy and national security. "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."<sup>169</sup> In an opinion upholding the constitutional rights of aliens to be free from indefinite detention, this language can be considered simple dicta or an exception to the rule against indefinite detention. The current national tension and the war on terrorism, however, might permit this exception to swallow the rule, and allow *Zadvydas* to be viewed as a case which actually justifies the Government

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*Circumstances" for Indefinite Custody*, CHARLESTON GAZETTE, Nov. 25, 2001, available at 2001 WL 6701457.

166. Tamar Lewin, *Deported Immigrants with Nowhere to Go Wait in Jail*, N.Y. TIMES, Dec. 10, 2001, at B5. Stateless detainees from Middle Eastern countries, however, have not substantially benefited from the Court's ruling. *Id.*

167. See Jonathan Ringel, *Will New Anti-Terror Tools Pass Court Muster?*, LEGAL TIMES, Oct. 8, 2001, at 14.

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

169. *Id.*

instead of condemning it in affording less due process rights to aliens. While the new measures proposed and adopted by Congress and the INS are necessary to combat terrorist threats by American enemies, the measures will most likely circumvent any progress achieved within the aliens' rights tradition at the expense of innocent, non-terrorist aliens.

### A. *The USA PATRIOT Act*

On October 26, 2001, President George W. Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act).<sup>170</sup> Among many budgetary and statutory changes that will help prevent future terrorist acts, Congress amended the INA to heighten enforcement of immigration violations.<sup>171</sup> Through section 412 of the USA PATRIOT Act, Congress added section 236A to the INA, entitled "Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review."<sup>172</sup> Under the new section 236A, Congress granted the Attorney General the power to detain any alien whom he certifies is a suspected terrorist.<sup>173</sup> Certification occurs if the Attorney General has "reasonable grounds to believe" that an alien is a security threat or terrorist as already defined in the Act.<sup>174</sup> Furthermore, the Attorney General must bring charges against an alien within seven days after detention, allowing release if the procedural rule is not followed.<sup>175</sup> This provision expands the power to detain, as the previous rule required that the alien be charged within forty-eight hours after detention.<sup>176</sup>

Most notable, however, is the language in the new section 236A concerning indefinite detention. Under the new section 236A, the Attorney General is allowed to detain an alien beyond the ninety-day statutory detention period for removal.<sup>177</sup> The section incorporates the "reasonably foreseeable" standard implemented by the *Zadvydas* Court, but in such a way that it actually allows the Attorney General to detain

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170. Memorandum from James W. Ziglar, INS Commissioner, to the Regional Directors and Regional Counsel 1 (Oct. 31, 2001), available at <http://www.immigration.gov/graphics/lawsregs/handbook/patriot.pdf>.

171. *Id.*

172. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56 § 412, 115 Stat. 272, 351, available at <http://www.immigration.gov/graphics/lawsregs/patriot.pdf>.

173. *See id.* § 412, 115 Stat. 272, 350-52.

174. *See id.* The USA PATRIOT Act also broadened the definition of "terrorist activity." *Id.* § 411, 115 Stat. 272, 345-50.

175. *See id.* § 412, 115 Stat. 272, 351.

176. Adam Cohen, *Rough Justice: The Attorney General Has Powerful New Tools to Fight Terrorism. Has He Gone Too Far?*, TIME, Dec. 10, 2001, available at 2001 WL 29385648.

177. *See* USA PATRIOT Act, § 411, 115 Stat. 272, 351.

indefinitely “only if the release of an alien will threaten the national security of the United States or the safety of the community or any person.”<sup>178</sup> The Act permits the Attorney General discretion to review an alien’s case every six months and revoke certification.<sup>179</sup> The text of the new section implements the Court’s new standard, yet also implements a distorted view of the decision based on a narrow interpretation of *Zadvydas*.

### B. *The New Immigration Service Rules*

On November 14, 2001, the Immigration and Naturalization Service reported new rules to supplement the existing rules governing custody of removable aliens.<sup>180</sup> In light of the Supreme Court’s *Zadvydas* decision, the Service amended existing section 241.4 of the Code of Federal Regulations, and created sections 241.13 and 241.14.<sup>181</sup> The existing regulation, section 241.4, provides for automatic administrative custody review procedures that give a detained alien the opportunity to present evidence to support his or her release from custody after the expiration of the ninety-day statutory removal period under the INA, section 241(a)(3).<sup>182</sup> Section 241.4 applies to aliens that are not considered to be dangerous to the community or a flight risk.<sup>183</sup> The existing section is now accompanied by new provisions that incorporate the Supreme Court’s “reasonably foreseeable standard” as stated in *Zadvydas*.<sup>184</sup>

The new section 241.13 applies to aliens who have been admitted and later ordered removed, other deportable aliens who are determined to be a danger to the community or a flight risk, and those aliens found within the United States without inspection who are considered inadmissible.<sup>185</sup> Section 241.13 governs certain aspects of custody determination of a detained alien after the expiration of the ninety-day removal period.<sup>186</sup> According to *Zadvydas*, an alien must provide “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.”<sup>187</sup> In response to the Court’s holding, the new

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178. *Id.*

179. *Id.*

180. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001) (codified at 8 C.F.R. pts. 3 and 241), *available at* 2001 WL 1408247 (F.R.) [hereinafter Continued Detention].

181. *See generally id.*; *see also* 8 C.F.R. § 241.4 (2002).

182. Continued Detention, *supra* note 180.

183. *Id.*

184. *See generally id.*

185. *Id.* at 56,977; *see also* 8 C.F.R. § 241.13 (2002).

186. Continued Detention, *supra* note 180, *see also* 8 C.F.R. § 241.13 (2002).

187. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

rule establishes a process to determine whether a significant likelihood that an alien can be removed within the reasonably foreseeable future exists.<sup>188</sup> If the Immigration Service determines under section 241.13 that no significant likelihood of removal exists, then the alien is placed into section 241.14 proceedings, where he or she may be subsequently released subject to strict supervision standards.<sup>189</sup> The Service can choose to place an alien that is not likely to be removed within the reasonably foreseeable future into section 241.14 proceedings to justify the continued detention of the alien due to special circumstances.<sup>190</sup>

The new section 241.14 was created for those "special circumstances" mentioned by the *Zadvydas* Court that would justify the continued detention of an alien even if the alien's removal is not likely within the reasonably foreseeable future.<sup>191</sup> Section 241.14 applies to aliens who possess highly contagious diseases that pose a danger to the public, and individuals who are especially dangerous due to a mental condition or personality disorder.<sup>192</sup> Further, and most significant, section 241.14 applies to those aliens that present foreign policy concerns,<sup>193</sup> and those aliens that pose national security and terrorism concerns.<sup>194</sup>

The Service can place an alien in section 241.14 proceedings due to foreign policy consequences only if the Department of State advises the Service to do so.<sup>195</sup> The Service does not question this advice and follows the Department's recommendation, allowing no factual considerations or review by an immigration judge.<sup>196</sup> This procedure attempts to reflect the language used in *Zadvydas* regarding judicial deference to the executive branch in foreign policy matters.<sup>197</sup> Because the Secretary of State possesses expertise in the field of foreign relations, his policy considerations as to the detention of an alien are not to be questioned.<sup>198</sup>

Continued detention due to national security and terrorism concerns are determined differently, however. In those cases, the Attorney General is the ultimate decision-maker as to an alien's continued detention under the new regulation.<sup>199</sup> The Attorney General makes a predictive

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188. See Continued Detention, *supra* note 180, at 56,968; see also 8 C.F.R. § 243.13 (2002).

189. 8 C.F.R. § 241.13(b) (2002). If the alien does not comply with supervision, the alien will be placed in custody once more. *Id.* § 241.13(i).

190. *Id.* § 241.13(e)(6).

191. Continued Detention, *supra* note 180, at 56,979.

192. See generally 8 C.F.R. § 241.14 (2002).

193. *Id.* § 241.14(c).

194. *Id.* § 241.14(d).

195. *Id.* § 241.14(c)(2).

196. Continued Detention, *supra* note 180, at 56,973.

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

198. Continued Detention, *supra* note 180, at 56,973.

199. 8 C.F.R. § 241.14(d)(2) (2002).

judgment based on recommendations from the Immigration Service Commissioner and the Director of the Federal Bureau of Investigation.<sup>200</sup> The Attorney General then decides the alien's fate based on past and present conduct, although the regulation permits the Attorney General to reach a determination based on a wide variety of circumstances.<sup>201</sup> The regulation grants this extreme power to the Attorney General because of his unique relationship to the intelligence community, and his important position within the executive branch.<sup>202</sup>

The changes set forth in the USA PATRIOT Act and the Immigration Service's new rules extend an inordinate amount of power to the Government to bypass the Supreme Court's six-month reasonably foreseeable standard concerning indefinite detention. Congress and the Service did not blatantly ignore the Supreme Court's ruling against indefinite detention. Rather, Congress and the Service construed as the holding what was originally considered dicta, and artfully drafted the regulations tailored to fall within those dicta. While the *Zadvydas* Court had principally recognized that due process applies to "all persons within the United States,"<sup>203</sup> the Court also mentioned that circumstances existed that precluded the application of the Court's decision against indefinite detention. Proponents of the new measures find justification within the language of the *Zadvydas* majority opinion, relying on a narrow interpretation of the ruling and emphasizing the special circumstances dictum.<sup>204</sup>

### C. Public Reaction to the New Preventive Measures

While the new measures encouraged by the USA PATRIOT Act and the Immigration Services rules find justification within the language of *Zadvydas*, legal experts and the media have labeled the measures employed by the authorities since September 11 to be the "antithesis of due process."<sup>205</sup> Proponents of the measures, however, claim that the regulations have not undermined the progressive effect of the *Zadvydas* decision.<sup>206</sup> The Service reported that since *Zadvydas* and even since September 11, the Service has released detainees from Iran, Iraq, Afghanistan, and Jordan.<sup>207</sup> According to the Service, these detainees

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200. Continued Detention, *supra* note 180, at 56,973.

201. *Id.*

202. *Id.* Furthermore, Congress has granted the Attorney General similar broad authority within the INA.

203. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted).

204. See Chardy, *supra* note 165.

205. Judy Peres, *Concerns Rise of Civil Rights Being Ignored*, CHICAGO TRIB., Oct. 16, 2001, at 8.

206. Lewin, *supra* note 166.

207. *Id.*

proved that they would not pose a threat to public safety and would comply with surveillance conditions.<sup>208</sup> Other proponents argue that the new measures do not actually deal with the issue of indefinite detention as reviewed by the Supreme Court.<sup>209</sup> The regulations merely allow the Government to revoke the bond of a dangerous alien during the ninety-day removal period, which was not at issue in *Zadvydas*.<sup>210</sup> The measures do not allow detention beyond the ninety-day statutory period or beyond any six-month reasonably foreseeable period.<sup>211</sup> Referring to the exceptions mentioned in *Zadvydas*, proponents argue that such measures are “well within the bounds of constitutionality.”<sup>212</sup>

Attorney General John Ashcroft has attempted to dismiss any criticism offered by civil rights advocates. According to Ashcroft, critics have overstated the role that the new measures might play in eroding civil rights.<sup>213</sup> The Attorney General has assured that the new measures reflect a meditated balance between security and rights.<sup>214</sup> Using the now infamous discourse on the war against terrorism, Ashcroft accused critics of the new regulations of aiding terrorists by figuratively supplying enemies with “ammunition” to “erode our national unity and diminish our resolve.”<sup>215</sup> The Attorney General finds validation for the new measures in a terrorist manual that instructs its members to use American liberties against America.<sup>216</sup> Ashcroft claims that measures allowing secrecy in proceedings and extended detention are necessary to prevent communication among terrorist networks.<sup>217</sup> Any leeway given in these proceedings is considered by the administration to be a lost battle in the war against terrorism.

Many believe, however, that the “war on terrorism” discourse is misplaced. According to opponents of the new measures, the Attorney General is mischaracterizing the criticism.<sup>218</sup> The issue is not whether critics are siding with the terrorists, as Ashcroft claims, but whether civil

208. *Id.*

209. Ringel, *supra* note 167.

210. *Id.*

211. *Id.*

212. *Id.*

213. Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps; Civil Liberties Groups' Attacks 'Only Aid Terrorists,' Senate Panel Told*, WASH. POST, Dec. 7, 2001, available at 2001 WL 31540631.

214. *Id.*

215. *Id.* (citing Attorney General Ashcroft's comments before the Senate Judiciary Committee on Dec. 6, 2001).

216. *Id.*

217. Cohen, *supra* note 176. Initially, the Attorney General claimed that secrecy was necessary to protect the identities of those detained, “to prevent the creation of [a] McCarthy-style blacklist.” *Id.*

218. Eggen, *supra* note 213.



liberties are preserved in combating the terrorists.<sup>219</sup> Although the Attorney General and Congress purport to justify the measures even under *Zadvydas*, the secrecy involved in current detentions of terrorist suspects makes it difficult to verify whether the detentions are justified.<sup>220</sup> Critics believe that Congress and the Immigration Service have erroneously ignored the essence of Justice Breyer's *Zadvydas* opinion and have precariously focused on the mere dicta relating to terrorists.<sup>221</sup> The American Civil Liberties Union (ACLU) has characterized the *Zadvydas* dicta not as an exception to the reasonably foreseeable rule, but as a question that the Court left for future consideration.<sup>222</sup> According to the ACLU, the *Zadvydas* Court did not analyze the constitutionality of indefinite detention of suspected terrorists, and therefore the issue is still subject to constitutional scrutiny. In the meantime, *Zadvydas* and the basic civil liberties entitled to all persons in no way justify the powers granted to the executive branch to detain suspects in this war on terrorism.

VI. JUDICIAL REACTION TO SEPTEMBER 11, 2001, IN LIGHT OF  
*ZADVYDAS V. DAVIS; PATEL V. ZEMSKI*

Although the current crisis, paranoia, and tension produced by the September 11 attacks will most likely lead to a narrow interpretation of *Zadvydas* and allow the decision to be used as a tool for justifying the detention of innocent aliens, the Third Circuit Court of Appeals has surprisingly followed the true essence of *Zadvydas* in *Patel v. Zemski*,<sup>223</sup> the first federal court of appeals decision to consider mandatory detention of aliens.<sup>224</sup> Vinobhai Bholidas Patel was, like *Zadvydas*, a lawful permanent resident for a long period of time and subsequently convicted of an aggravated felony.<sup>225</sup> After living in the United States for seventeen years, Patel was convicted of harboring an undocumented alien and providing the alien with board and employment at Patel's Dunkin Donuts businesses.<sup>226</sup> Patel served five months in prison and five months of home probation.<sup>227</sup> Upon his release, Patel was placed in removal proceedings pursuant to INA section 237(a)(2)(A)(iii) and

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219. *Id.* (citing comment delivered by Senate Committee Chairman, Patrick J. Leahy).

220. Cohen, *supra* note 176.

221. Ringel, *supra* note 167.

222. *Id.*

223. 275 F.3d 299 (3d Cir. 2001).

224. Tamar Lewin, *Appeals Court Overturns Policy on Detaining Immigrants*, N.Y. TIMES, Dec. 20, 2001, at A32.

225. *Patel*, 275 F.3d at 303.

226. *Id.*

227. *Id.*

detained by immigration authorities pursuant to INA section 236(c).<sup>228</sup> Section 236(c) calls for the immediate detention of an alien who has been convicted of an aggravated felony.<sup>229</sup>

The direct issue before the Third Circuit was whether an alien who is detained under section 236(c) could be detained without an opportunity for an individualized determination of the potential flight risk or potential danger that an alien can pose to the community.<sup>230</sup> The court interestingly pointed out that even alien terrorists are allowed such an opportunity, yet Patel, who was not charged as a terrorist, had not been able to exercise this right.<sup>231</sup> In short, the issue before the Third Circuit was whether detained aliens are entitled to the substantive due process right of freedom from restraint of liberty.

The court recognized that the purpose for the enactment of INA section 236(c) was to limit the relief available to detained criminal aliens and expand the categories under the definition of aggravated felony to allow more criminal aliens to be detained upon their release from prison.<sup>232</sup> The only available relief allowed by INA section 236(c) is in the event that release would be necessary to protect a witness.<sup>233</sup> Also, relief from mandatory detention is available if the criminal alien does not pose a danger to the community or is a flight risk.<sup>234</sup>

Relying on the Supreme Court's decision in *Zadvydas*, the Third Circuit recognized that the Due Process Clause protects all aliens within the United States, regardless of whether their presence is lawful.<sup>235</sup> The point of contention in *Patel*, however, was the level of due process that could be afforded to aliens.<sup>236</sup> Generally, a provision that infringes on a fundamental liberty interest, such as the right to be free from restraint, must undergo a strict scrutiny analysis when challenged.<sup>237</sup> The Government argued that section 236(c) should not be subject to the court's strict scrutiny since aliens are entitled to less due process rights than

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228. *Id.*

229. Immigration and Nationality Act § 236(c)(1), 8 U.S.C. § 1226 (2000). Section 1226(c)(1) states: "The Attorney General shall take into custody any alien who—(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title."

230. *Patel*, 275 F.3d at 302.

231. *Id.*

232. *Id.* at 304.

233. *Id.* at 305; *see also* Immigration and Nationality Act § 236(c)(2), 8 U.S.C. § 1226(c)(2) (regarding the exception to section 236(c)(1) on mandatory detention).

234. *Patel*, 275 F.3d at 305.

235. *Id.* at 307.

236. *Id.*

237. *See id.* at 308.

citizens.<sup>238</sup> The Third Circuit, however, decided not to deviate from the essence of *Zadvydas* and concluded that section 236(c) did in fact impede an alien's fundamental right of liberty.<sup>239</sup> The infringement was apparent, especially since Patel had been detained for a total of eleven months, five months longer than the *Zadvydas* reasonably foreseeable period.<sup>240</sup> According to the *Patel* Court, therefore, an alien is entitled to a substantial amount of due process.

Since aliens are entitled to due process, the court engaged in interest balancing and inquired whether there was a compelling state interest under section 236(c) to detain an alien without an individualized determination as to the necessity for an alien's detention.<sup>241</sup> Relying on the special circumstances language in *Zadvydas*, the court stated that a special or non-punitive circumstance could outweigh an alien's interest in liberty.<sup>242</sup> The court considered mandatory detention under section 236(c) a compelling state interest because the Government's power to deport aliens implies the power to detain, a power that is regulatory in nature rather than punitive.<sup>243</sup>

The court concluded that mandatory detention under section 236(c) without an individualized hearing to determine whether a particular alien is a flight risk or danger to the community was a violation of the due process rights of the alien because of the statute's lack of an individualized determination.<sup>244</sup> In *Patel*, therefore, the liberty interest of the alien outweighed the Government's interest in detaining Patel without an opportunity to demonstrate that he was neither a flight risk nor a danger to the community.<sup>245</sup>

Most notable about the *Patel* opinion is its advancement of the aliens' rights tradition while limiting the plenary power doctrine to questions of congressional policy. The court observed that while Congress has the power to create policies for alien exclusion, *Zadvydas* declared that the authority of Congress in implementing its policies is limited by constitutional concerns, such as due process.<sup>246</sup> Congress, therefore, is not due deference when a policy invades the due process rights of aliens.<sup>247</sup> Although the Third Circuit could have narrowed the holding of *Zadvydas* and distinguished the Supreme Court's case on the basis

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238. *Id.* at 307.

239. *Id.* at 310.

240. *Id.* at 309.

241. *Id.* at 311.

242. *Id.* at 309.

243. *Id.* at 310.

244. *Id.* at 311-12.

245. *Id.* at 312.

246. *Id.* at 307-08.

247. *Id.* at 308.

that both cases dealt with different stages in the removal process and with different statutes, the Third Circuit continued the progress achieved by the *Zadvydas* Court.<sup>248</sup>

## VII. CYCLES OF TENSION AND THEIR EFFECTS ON ALIENS

Throughout history, the United States has suffered from paranoia as a result of tragic events. In the aftermath of a tragedy, Congress usually passes laws that seek to find those culpable for causing the tragedy. Such laws, regulations, or procedures are often implemented disregarding usual protections guaranteed under the Constitution. Unfortunately, aliens, whether lawfully present or not, bear the brunt of the nation's paranoia in the aftermath of a tragedy. The failure to afford constitutional protections to aliens is based on the difference in status between citizens and noncitizens. Because noncitizens, or aliens, do not enjoy the same degree of protection under the Constitution, the Government feels justified in discriminating or curbing due process rights in an effort to preserve national stability.

The term "alien" plays an important role in justifying the distinction between noncitizens and citizens, and consequently in differentiating their respective enjoyment of due process.<sup>249</sup> The term "alien" makes noncitizens seem as outsiders coming to invade the status quo of the nation.<sup>250</sup> The image of an alien sparks citizen animosity against foreigners, which is adverse to the ideal of equality among persons of all races and ethnicities within American society.<sup>251</sup>

The term "alien" is itself parsed into a distinction between deportable aliens and excludable aliens.<sup>252</sup> A deportable alien, or one who has lawfully been admitted into the United States and has established lawful permanent residency, is considered a "good alien."<sup>253</sup> Excludable aliens, on the other hand, are those aliens who attempted to enter the United States illegally and are thus labeled "bad aliens."<sup>254</sup> Consequently, "good aliens" receive more due process rights and more favorable treatment by the courts than "bad aliens."<sup>255</sup> The overall effect of the use of

248. The Third Circuit also looked to its own precedent in *Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999), where the Court afforded due process rights to an excludable alien from Vietnam.

249. Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1997).

250. See generally *id.* The use of this term masks the human impact of immigration laws, transforming persons into "faceless, nonhuman, demon 'aliens' . . . ." *Id.* at 292.

251. Anti-alien sentiment is especially seen in legislation limiting public benefits. See generally *Landon v. Plasencia*, 459 U.S. 21 (1982).

252. Johnson, *supra* note 249, at 274-75.

253. *Id.* at 276.

254. *Id.*

255. *Id.* at 274-76.

the term "alien," however, has mostly led to a disparate effect on people who do not fit within the Anglo-Saxon mainstream.<sup>256</sup> Basically, the mistreatment of aliens under immigration laws and public benefit laws serves as a hidden justification for racism within the United States.<sup>257</sup>

Throughout history, the United States has suffered many traumatic periods that have sparked alien resentment. Such periods revive cycles of tension within the American psyche that result in detrimental consequences for foreigners within United States territory.<sup>258</sup> In essence, these periods of national tension have allowed the United States to justify laws discriminating against aliens and limiting their due process rights.<sup>259</sup> Particularly, immigration laws are enacted to protect the political and social order of the nation.<sup>260</sup> The first cycle of tension occurred after the Haymarket Riots in 1886.<sup>261</sup> A bomb exploded in the Haymarket Square in Chicago during a labor solidarity event.<sup>262</sup> Several anarchists were involved in the Haymarket demonstration, thereby giving rise to concern about anarchist uprising. Several anarchists were convicted for placing the bomb. As a result, America began to fear foreigners, anarchists especially.<sup>263</sup>

Following the Haymarket Riots, fear of alien anarchists likewise developed after the assassination of President William McKinley in 1901.<sup>264</sup> Even though the person accused of the assassination was a native-born citizen of the United States, everyone assumed that he was an alien due to his foreign-sounding last name, Czolgosz.<sup>265</sup> Consequently, Congress passed the Immigration Act of 1903, which called for the exclusion of all anarchists or those who foster the overthrow of the United States government.<sup>266</sup> The law also reflected concern regarding radicals in the labor movement.<sup>267</sup> The Immigration Act signaled a consensus among Americans of a fear of immigrants from Eastern and Central Europe who held views which threatened the political and social

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256. *Id.* at 292.

257. *Id.* at 281-82. Criticism of alien presence within the United States basically focuses on excuses such as overpopulation that is damaging to the environment, overconsumption of public benefits, increase in crime rates, and labor issues. *Id.* at 288-89.

258. See generally Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997).

259. *Id.*

260. *Id.* at 836.

261. *Id.* at 844.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 844 n.53.

267. *Id.* at 844.

values of the nation.<sup>268</sup> The Act was a consequence of an overreaction against aliens because of an ideology that many citizens and noncitizens alike possessed.<sup>269</sup> It was much easier for Congress, however, to enact the Immigration Act of 1903, an act that would directly impact aliens, because aliens are not entitled to the same constitutional protections guaranteed to citizens. The evolution of this fear continued throughout the Palmer Raids when Congress expanded the Immigration Act to include more ideological grounds for the expulsion of aliens.<sup>270</sup>

The threat of a communist invasion in the United States likewise provoked another cycle of tension. In *Harisiades v. Shaughnessy*,<sup>271</sup> the Supreme Court upheld the deportation of three former Communist Party members under the Alien Registration Act of 1940. The Court responded to communist fears and the need to limit the role of the judiciary in reviewing Congress's laws against Communist threats.<sup>272</sup>

In the 1970s and 1980s, Congress did not emphasize ideological restrictions for exclusion, but Congress still retained the power to limit entry based on ideology.<sup>273</sup> The 1990 Immigration Act even narrowed ideological exclusions because of the persuasive criticism that such measures were incompatible with the Constitution.<sup>274</sup> With the 1993 bombing of the World Trade Center, new concerns over terrorism arose.<sup>275</sup> The Antiterrorist Act of 1996, however, surfaced following the Oklahoma City bombing in April of 1995.<sup>276</sup>

Although an American citizen planned and effectuated the bombing of the Alfred T. Murrah federal building in Oklahoma City, the Antiterrorism Act penalized many noncitizens who had nothing to do with terrorism.<sup>277</sup> The Antiterrorism Act of 1996, enacted in response to this national tragedy, includes special removal provisions for "alien terrorists."<sup>278</sup> For example, a removal court is authorized to consider classified information against an alien that the Government believes might

268. *Id.* at 844 n.54.

269. *Id.* at 845.

270. *Id.* at 848. The Palmer Raids was a campaign initiated by Attorney General Alexander Palmer to locate subversives responsible for a series of bombings inspired by labor unrest. *Id.* at 846-47.

271. 342 U.S. 580 (1952).

272. Johnson, *supra* note 258, at 853.

273. *Id.* at 861.

274. *Id.* at 862. Some exclusions were permitted only if the Secretary of State personally determined that the alien's admission would compromise a compelling United States interest; the 1990 Act also allowed government power to exclude terrorists. *Id.* at 862-63.

275. *Id.* at 865-66.

276. *See generally id.*

277. *Id.* at 878.

278. *Id.* at 868.

endanger national security.<sup>279</sup> Such measures are considered to burden noncitizens by stripping them of rights in the name of fighting terrorism.

The cycles of tension that the United States has experienced throughout its history and subsequent laws against aliens reflect the nation's intolerance against certain political views.<sup>280</sup> Because citizens are protected under the Constitution and aliens are not entitled to the same rights as citizens, the regulations against aliens are considered to be an escape valve for the nation's tension.<sup>281</sup> Unfortunately, the tension is easily released against the most susceptible members of society.

### VIII. CONCLUSION

The September 11, 2001 tragedy constitutes a new cycle of tension within American society. The effects of the tension and paranoia are quickly revealing themselves in the USA PATRIOT Act and in the new Immigration Service rules aimed at aliens implicated in the terrorist network. In many respects, these measures are substantially important to prevent another possible attack on United States soil. Considering previous periods of crisis and the consequent adverse effects on innocent aliens, however, the current crisis will very likely lead to a renewed hostility against aliens in general. As a result of this slippery slope, innocent aliens will begin to suffer from the unfortunate condition of being foreigners living in the United States.

The effects of America's current tension are most significantly revealed in the narrow interpretation of *Zadvydas v. Davis*. Before September 11, *Zadvydas* was a breakthrough decision in the area of indefinite detention and aliens' rights. Because the decision held indefinite detention unconstitutional for resident aliens, the Supreme Court case had all the characteristics of becoming a seminal case within the aliens' rights tradition. Like *Lynch v. Cannatella*, however, many are already interpreting *Zadvydas* to stand for the exact opposite of what the Court essentially held, relying on mere dicta regarding terrorist detention. Unfortunately, the new preventive measures implemented by the executive and the legislative branches are quickly eroding the essence of *Zadvydas*, transforming the case into a powerful tool for advocating against aliens' rights. Hopefully, the judicial branch, as already seen in the Third Circuit's *Patel v. Zemski* decision, will serve as a buffer to this

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279. *Id.*

280. *Id.* at 869.

281. *See id.* at 872.

erosion and preserve the essence of *Zadvydas* as a breakthrough case within the aliens' rights tradition.

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