

**THE FUTURE OF ALIENS ORDERED  
REMOVED FROM THE UNITED STATES IN  
THE WAKE OF *ZADVYDAS v. DAVIS***

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## I. INTRODUCTION

With public attention greatly heightened in the wake of the September 11, 2001 terrorist attacks, as never before, the nation's eyes are focused upon U.S. immigration laws and policies.<sup>1</sup> However, as lawmakers and federal agencies reevaluate and revise the approaches to the complex questions surrounding immigration, they must also contend with the Supreme Court decision in *Zadvydas v. Davis*.<sup>2</sup>

*Zadvydas* deals with the issues concerning the governmental power to detain deportable aliens that no other country will accept.<sup>3</sup> Justice Stephen Breyer, writing for a 5-4 majority, ruled that the government did not have the power to indefinitely hold the aliens because of implicit reasonableness limitations in the controlling statutes.<sup>4</sup> Furthermore, Justice Breyer imposed a

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1. See, e.g., Jodie Morse, *Borderline Competent? The INS Tightens Up—and Sorts Through More than 6 Million Illegal Aliens Already in Our Midst*, TIME, Oct. 29, 2001, at 68 (discussing the INS reaction to the September 11 terrorist attacks).

2. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (decided June 28, 2001).

3. *Id.* at 682 (“[W]e must decide whether this . . . statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal.”)

4. *Id.* at 689. While the Government contended that the Attorney General had unlimited discretion in these detention decisions, Justice Breyer held that the statute

presumption that six months of detention is the limit for a reasonable detention.<sup>5</sup> After six months, if the alien shows that there is “no significant likelihood of removal in the reasonably foreseeable future,” the government must offer evidence to rebut that showing to prevent the alien from being released.<sup>6</sup>

This Note contends that the Court’s opinion is flawed in three critical respects. The majority’s construction of the statute as containing implicit reasonableness limitations is contrary to the statute’s plain language, contradicts congressional intent, and results in odd and unintended consequences.<sup>7</sup> The second problem stems from the Court’s affirmation of the constitutional significance of territorial distinctions.<sup>8</sup> This differentiation perpetuates an unstable, tiered system of alien rights that grants minimal and unclear rights to aliens stopped at the border, while giving broad constitutional protection to those able to gain entry, legally or illegally.<sup>9</sup> The third problem, the creation of a presumptively reasonable detention period, not only rests upon weak precedential footing,<sup>10</sup> but also, by limiting the Attorney General’s ability to detain dangerous aliens, greatly diminishes the capacity of the Immigration and Naturalization Service (INS) to fulfill the statute’s goal of community protection.<sup>11</sup>

This Note also discusses judicial, administrative, and legislative reactions to *Zadvydas*. Aliens have petitioned the courts to extend reasonableness limitations to the detention of inadmissible aliens<sup>12</sup> and to pre-removal detention.<sup>13</sup> Various

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must be interpreted to contain limitations of reasonableness. *Id.* at 697-99.

5. *Id.* at 701.

6. *Id.*

7. *See id.* at 706-16 (Kennedy, J., dissenting).

8. *See id.* at 693.

9. *See Leading Cases*, 115 HARV. L. REV. 366, 371-75 (2001).

10. *See Zadvydas*, 533 U.S. at 712-13 (Kennedy, J., dissenting).

11. *See id.* at 713-16 (Kennedy, J., dissenting).

12. *See, e.g., Alien’s Successive Habeas Petition Not Saved by Zadvydas, Sixth Circuit Rules*, 78 No. 41 INTERPRETER RELEASES 1637, 1637 (2001) (discussing *Zadvydas*’s reliance on territorial distinctions and its applicability only to removable aliens).

13. *See, e.g., Yanez v. Holder*, 149 F. Supp. 2d 485, 494-95 (N.D. Ill. 2001).

circuit courts have afforded greater protection to aliens during removal proceedings.<sup>14</sup> For example, relying upon *Zadvydas*'s affirmation of substantial due process rights to removal of aliens, some courts have found that mandatory pre-removal detention is unconstitutional and have attacked the controlling statute.<sup>15</sup> With the invalidation of this federal immigration law in various circuits,<sup>16</sup> the scope of the *Zadvydas* decision will continue to be contested across the nation, and the Supreme Court may once again need to speak to these issues.

The INS has enacted new rules that amend the custody review process for the detention of aliens ordered removed.<sup>17</sup> Generally, these rules call for the release of aliens as mandated by *Zadvydas*.<sup>18</sup> However, the INS has mitigated the negative effects of the Court's decision by continuing the detention of certain dangerous aliens,<sup>19</sup> and by requiring parole restrictions for released aliens.<sup>20</sup>

Congress, in enacting the USA Patriot Act,<sup>21</sup> included a provision that mirrors the Court's holding concerning the presumably reasonable period.<sup>22</sup> Congress, however, granted the Attorney General the discretion to consider the danger an alien poses to the community when contemplating the alien's release.<sup>23</sup> While the USA Patriot Act is limited to aliens posing a terrorist or national security threat,<sup>24</sup> these provisions can be viewed as an acceptance of *Zadvydas*'s reasonableness limitations and as a rejection of the Court's position on extended

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14. See, e.g., *Patel v. Zenski*, 275 F.3d 299, 314-15 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523, 539 (9th Cir. 2002).

15. See *Patel*, 275 F.3d at 310-12; *Kim*, 276 F.3d at 535.

16. See *Patel*, 275 F.3d at 312; *Kim*, 276 F.3d at 534.

17. 8 C.F.R. § 241 (2002).

18. § 241.13.

19. § 241.14.

20. § 241.13(h)(1)-(2), (4).

21. Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act), Pub. L. No 107-56, 115 Stat. 272 (to be codified in scattered sections of 8 U.S.C.).

22. See 8 U.S.C.A. § 1226A(a)(6) (2002).

23. See *id.* § 1226A(a)(3), (6).

24. *Id.* § 1226A(a)(3).

detention for dangerous aliens.<sup>25</sup>

This Note begins with a case recitation, followed by an analysis of the *Zadvydas* opinion. The analysis focuses on the Court's use of the avoidance doctrine in the interpretation of the statute, the due process rights of aliens after *Zadvydas*, and the creation of the presumably reasonable detention period with the Attorney General's limited scope of discretion. The fourth section of this Note explores the reactions of the various branches of government to this case by reviewing judicial attempts to expand *Zadvydas* and analyzing changes in administrative regulations and statutory law.

## II. CASE RECITATION

### A. *Facts and Procedural History*

The *Zadvydas* decision consolidated two appeals from similar cases, *Zadvydas v. Underdown*<sup>26</sup> and *Ma v. Reno*.<sup>27</sup> The first case involved Kestutis Zadvydas, a resident alien born in Germany of Lithuanian parents.<sup>28</sup> He immigrated to the United States when he was eight years old and had resided in the United States ever since.<sup>29</sup> Zadvydas had a long criminal record that included: drug crimes, attempted robbery, burglary, and theft; and a history of flight from criminal and deportation proceedings.<sup>30</sup> In 1994 after serving two years of a sixteen-year drug sentence, he was released to the INS and ordered deported.<sup>31</sup> Repeated efforts to identify a country willing to accept Zadvydas failed, and the INS continued to detain him

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25. See *Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills*, 78 No. 39 INTERPRETER RELEASES 1591, 1592-93 (2001) (explaining that the provision comports with the presumptive period, but allows the Attorney General to consider whether an alien is dangerous to the community or any individual).

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

27. *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000).

28. *Zadvydas v. Davis*, 533 U.S. 678, 684 (2001).

29. *Id.*

30. *Id.*

31. *Id.*

throughout the mid-1990s.<sup>32</sup>

In 1995, Zadvydas filed a writ of habeas corpus challenging his detention.<sup>33</sup> Two years later in 1997, the United States District Court for the Eastern District of Louisiana ordered him released under supervision.<sup>34</sup> The Fifth Circuit reversed this result in 1999, concluding that the confinement was constitutional because deportation was not impossible, good faith efforts to deport him continued, and detention was subject to administrative review.<sup>35</sup>

The second case considered was *Ma*.<sup>36</sup> Kim Ho Ma was born in Cambodia and immigrated into the United States at the age of seven.<sup>37</sup> In 1995, Ma was convicted of manslaughter.<sup>38</sup> After serving two years in prison, he was released to the INS and ordered removed.<sup>39</sup> The INS detained Ma past the removal period because they were “unable to conclude that [he] would remain nonviolent and not violate the conditions of release.”<sup>40</sup>

In 1999, Ma filed a petition for a writ of habeas corpus.<sup>41</sup> A five-judge panel considering 100 such cases in the United States District Court for the Western District of Washington held that the Constitution forbade extended detention, unless there is “a realistic chance that [the] alien will be deported.”<sup>42</sup> After an evidentiary hearing, a judge found that Ma had no realistic chance of being deported, and ordered his release.<sup>43</sup> The Ninth Circuit affirmed, concluding that the statute did not authorize detention for longer than a reasonable period.<sup>44</sup>

Because of contradictory results in the Fifth and Ninth

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32. *Id.*

33. *Id.* at 684-85.

34. *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1027-28 (E.D. La. 1997).

35. *Zadvydas v. Underdown*, 185 F.3d 279, 291-297 (5th Cir. 1999).

36. *Zadvydas*, 533 U.S. at 685.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (quoting Appendix to Petition for Certiorari at 87a, *Zadvydas v. Davis* (No. 00-38)). Ma had a history of gang-related activities. *Id.*

41. *Id.* at 686.

42. *Phan v. Reno*, 56 F. Supp. 2d 1149, 1156 (W.D. Wash. 1999).

43. *Zadvydas*, 533 U.S. at 686.

44. *Ma v. Reno*, 208 F.3d 815, 818 (9th Cir. 2000).

Circuits, the Supreme Court granted writs in both cases and decided the cases together.<sup>45</sup>

*B. Majority Opinion*

The principal statute at issue in *Zadvydas* is 8 U.S.C. § 1231(a)(6), which provides that an alien ordered removed—who the Attorney General has determined to be a risk to the community or unlikely to comply with the removal order—may be detained beyond the removal period.<sup>46</sup>

The majority opinion began its analysis by reciting the principle of statutory interpretation that, when a statute raises a serious doubt as to its constitutionality, the Court will “ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.”<sup>47</sup>

Justice Breyer concluded that the statute raises a serious constitutional doubt because the Fifth Amendment’s Due Process Clause protects against such indefinite detention.<sup>48</sup> To survive a constitutional attack, civil, non-punitive detention must be supported by sufficiently strong special justifications.<sup>49</sup> The justification advanced by the Government for such detention was the risk of flight and danger to the community.<sup>50</sup> Justice Breyer disregarded the risk of flight because, absent foreseeable deportation, there is nothing from which to flee.<sup>51</sup> As to the danger to the community justification, special circumstances must exist before one can be held for preventive reasons, and the detention must be subject to strong procedural

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45. *Zadvydas*, 533 U.S. at 686.

46. 8 U.S.C. § 1231(a)(6) (2000). During removal proceedings, aliens may be released on bond or paroled. *See id.* § 1226(a)(2)(A). However, after a final deportation order has been entered, the aliens must be held in custody for a ninety-day “removal period.” *Id.* § 1231(a)(1)-(2). Post-removal period detention is permitted under § 1231(a)(6), the statute examined in *Zadvydas*. *Id.* § 1231(a)(6); *Zadvydas*, 533 U.S. at 682.

47. *Zadvydas*, 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

48. *Id.* at 690.

49. *Id.*

50. *Id.*

51. *Id.*

protections.<sup>52</sup> However, the statute does not require such special circumstances and applies to a large group of aliens.<sup>53</sup> Furthermore, Justice Breyer reasoned, there is a lack of procedural protection under § 1231 because an alien must prove that he is not dangerous, an administrative body makes the detention decision, and the detainee is not afforded significant judicial review.<sup>54</sup>

With the potential for constitutional problems established, Justice Breyer turned his attention to finding an interpretation of the statute that would avoid constitutional doubt.<sup>55</sup> He concluded that the statute could be read with implicit reasonableness limitations because there was no clear congressional intent to authorize the indefinite, perhaps permanent, detention.<sup>56</sup> Justice Breyer determined that, to avoid constitutional problems, the statute should be read to mean that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”<sup>57</sup>

After establishing reasonableness limitations, Justice Breyer delineated the mechanics of these requirements.<sup>58</sup> Justice Breyer concluded that the basic habeas statutes allow federal courts to answer the reasonableness question.<sup>59</sup> In making the reasonableness determination in a habeas review, a court should consider § 1231’s primary purpose, assuring the alien’s presence at the moment of removal.<sup>60</sup> Once removal becomes unforeseeable, the detention is unreasonable, and the alien should be released.<sup>61</sup>

To aid in this determination, Justice Breyer established a

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52. *Id.* at 690-91.

53. *Id.* at 691. Justice Breyer was troubled that simple visa violators are subject to this extended detention. *Id.*

54. *Id.* at 692.

55. *Id.* at 696-97.

56. *Id.* at 699.

57. *Id.*

58. *Id.* at 699-700.

59. *Id.* at 699.

60. *Id.*

61. *Id.* at 699-700.

presumptively reasonable detention period of six months.<sup>62</sup> Limits on the detention period, Justice Breyer reasoned, are justified by the need for tough judicial decisions and uniform application of the law.<sup>63</sup> After the six-month period passes and a detained alien shows that removal is unforeseeable, the government must offer evidence to rebut that showing.<sup>64</sup> If the government cannot produce such proof, the alien should be released into the United States.<sup>65</sup>

### C. Dissenting Opinions

Justices Kennedy and Scalia filed dissenting opinions.<sup>66</sup> Part I of Justice Kennedy's dissent was joined by all four dissenting Justices and attacked the majority's interpretation of the statute.<sup>67</sup> Justice Kennedy argued that to imply reasonableness limitations is not a fair reading of the statute and frustrates congressional intent.<sup>68</sup> In reaching these conclusions, Justice Kennedy examined the reasonableness limitations, the goals of the statute, and the balance of power between the branches of government concerning such aliens.<sup>69</sup>

Part II of Justice Kennedy's dissent focused on the rights of detained aliens.<sup>70</sup> He argued that aliens do not possess the substantive right to be free in the United States; however, they are entitled to freedom "from detention that is arbitrary or capricious."<sup>71</sup> He asserted that detention is not arbitrary and capricious when the detention is based on protecting against the risk of flight or danger to the community, and is subject to adequate procedural safeguards.<sup>72</sup> Thus, Justice Kennedy argued, the laws governing alien status allow for indefinite

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62. *Id.* at 701.

63. *See id.*

64. *Id.*

65. *Id.*

66. *See id.* at 702-25.

67. *Id.* at 705-07 (Kennedy, J., dissenting).

68. *Id.* at 706-17 (Kennedy, J., dissenting).

69. *Id.* (Kennedy, J., dissenting).

70. *Id.* at 718-25 (Kennedy, J., dissenting).

71. *Id.* at 718-21 (Kennedy, J., dissenting).

72. *Id.* at 721-22 (Kennedy, J., dissenting).

detention, as long as such detention is not arbitrary or capricious.<sup>73</sup>

Justice Scalia's dissent was similar to Part II of Justice Kennedy's, in that it asserted that aliens lack substantive rights to be free in the United States.<sup>74</sup> In the absence of such a right, Justice Scalia believed that there were no constitutional problems with the indefinite detention of the aliens.<sup>75</sup>

### III. ANALYSIS

The Court's opinion in *Zadvydas* is problematic in three critical respects: in the application of the statutory interpretation principle of the avoidance doctrine;<sup>76</sup> in the Court's reliance upon the constitutional significance of territorial distinctions; and in the creation of the presumably reasonable detention period with the limited scope of discretion afforded the Attorney General.

#### A. *Problems with the Majority's Statutory Interpretation*

##### 1. *Background and Rationale of the Majority*

Declining to reach the merits of the constitutional question surrounding this detention, Justice Breyer, writing for the majority, construed § 1231(a)(6) under the avoidance doctrine.<sup>77</sup> The avoidance doctrine consists of two elements: (1) a serious

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73. *Id.* at 721 (Kennedy, J., dissenting). Justice Kennedy addressed the constitutional due process question by stating that the "liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens." *Id.* at 718 (Kennedy, J., dissenting).

74. *Id.* at 702-04 (Scalia, J., dissenting). The key difference between Scalia's and Kennedy's dissents was that Scalia believed that there are no situations in which a court can order the release of an alien, while Kennedy would allow for the release of the aliens if the detention were determined to be arbitrary or capricious. *See id.* at 702 (Scalia, J., dissenting); *id.* at 721 (Kennedy, J., dissenting).

75. *Id.* at 702-05 (Scalia, J., dissenting).

76. The avoidance doctrine is also known as the constitutional doubt rule. *See id.* at 707 (Kennedy, J., dissenting).

77. *Id.* at 689. "[I]t is a cardinal principle' of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

doubt as to the statute's constitutionality; and (2) the existence of a fair construction of the statute that avoids such constitutional infirmity.<sup>78</sup> Justice Breyer found constitutional problems in the literal reading of the statute and, thus, construed § 1231(a)(6) with implicit reasonableness limitations.<sup>79</sup>

In support of this construction, Justice Breyer examined the legislative history of the statute<sup>80</sup> and considered other statutes that clearly delineate the scope of the Attorney General's discretion.<sup>81</sup> Justice Breyer argued that the use of the word "may" in the statute was ambiguous and did not support the Attorney General's unlimited discretion.<sup>82</sup> After discussing various statutory developments, he concluded, "nothing in the history of these statutes . . . clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention."<sup>83</sup> Accordingly, Breyer applied the avoidance doctrine to forgo further constitutional analysis and interpreted § 1231(a)(6) to contain implicit reasonableness limitations.<sup>84</sup>

## 2. *Difficulties with the Use of the Avoidance Doctrine*

Despite the convenience of the avoidance doctrine, it was misapplied in this case. Justice Breyer's construction of § 1231(a)(6) is not a fair interpretation, and the inclusion of implicit reasonableness limitations is contrary to congressional intent.<sup>85</sup>

An analysis of precedent applying the avoidance doctrine reveals that the rule may not be used to "press statutory

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78. *Id.*; see *id.* at 707 (Kennedy, J., dissenting).

79. *Id.* at 692, 699.

80. *Id.* at 697-99.

81. *Id.* at 697 (comparing 8 U.S.C. § 1231(a)(6) (2000), with § 1537(b)(2)(c) (2000)). § 1537(b)(2)(c) requires the review of an alien's detention every six months. 8 U.S.C. § 1537(b)(2)(c) (2000). Justice Breyer also disregarded the argument that mandatory detention is the rule while discretionary release is the narrow exception because statutes that require detention apply only to narrow classes of aliens while § 1231(a)(6) is applied much more broadly. *Zadvydas*, 533 U.S. at 697.

82. *Zadvydas*, 533 U.S. at 697. "[A]n alien . . . may be detained beyond the removal period . . ." 8 U.S.C. § 1231(a)(6) (2000).

83. *Zadvydas*, 533 U.S. at 699.

84. *Id.*

85. See *id.* at 706 (Kennedy, J., dissenting).

construction to the point of disingenuous evasion[,] even to avoid a constitutional question.”<sup>86</sup> The doctrine may not be invoked when an interpretation is “plainly contrary to the intent of Congress.”<sup>87</sup> Case law requires that the competing constructions of the statute be of equal plausibility to be considered fairly possible.<sup>88</sup> Hence, for the avoidance doctrine to be applied in this case, Justice Breyer’s reasonableness interpretation must be balanced with the plain meaning of the statute to determine if they are of equal plausibility.<sup>89</sup>

The majority’s reading is not plausible because it distorts the stated congressional purposes of the statute, and it is contrary to the statute’s plain language.<sup>90</sup> According to Justice Kennedy, the delegation of power to the Attorney General is not ambiguous; while § 1231(a)(6) is silent on restraints of the Attorney General’s authority, other provisions of § 1231 explicitly provide for limitations in other circumstances.<sup>91</sup> Justice Kennedy reasoned that “[w]hen Congress has made express provisions for the contingency that repatriation might be difficult or prolonged in other portions of the statute, it should be presumed that its omission of the same contingency in the detention section was purposeful.”<sup>92</sup> In light of the broad discretion purposefully extended to the Attorney General, limitations on this power are contrary to congressional intent and, thus, cannot be read into the statute.<sup>93</sup>

Furthermore the majority’s construction creates odd and unintended results. With a six-month limit on detention, aliens have an incentive to obstruct or hinder their own deportation proceedings; they will be released into the United States rather

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86. *Salinas v. United States*, 522 U.S. 52, 60 (1997) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 (1996)).

87. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

88. *Zadvydas*, 533 U.S. at 707 (Kennedy, J., dissenting); see *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

89. *Zadvydas*, 533 U.S. at 707 (Kennedy, J., dissenting).

90. *Id.* (Kennedy, J., dissenting).

91. *Id.* at 708 (Kennedy, J., dissenting) (citing 8 U.S.C. § 1231(c)(1)(A), (c)(3)(A)(ii)(II) (2000)).

92. *Id.* (Kennedy, J., dissenting).

93. See *id.* (Kennedy, J., dissenting).

than being detained until the deportation proceedings are concluded.<sup>94</sup> Further, felons will more likely be released into the United States than violators of lesser crimes because countries often refuse to accept felons.<sup>95</sup> Such odd results cannot be what Congress intended and diminish the plausibility of the majority's interpretation.<sup>96</sup>

The use of the avoidance doctrine was inappropriate because Justice Breyer's interpretation is not a fair reading of the statute and produces odd and unintended results.<sup>97</sup> With such a problematic statutory interpretation, the probable result of a direct constitutional analysis must be considered.

## B. *Rights of Aliens Under the Due Process Clause*

### 1. *Background*

The importance of a person's territorial status has a long history in immigration case law.<sup>98</sup> This distinction gives constitutional protections to persons inside the United States, but limits the protections of aliens outside our borders.<sup>99</sup> Once a person crosses our borders, the Due Process Clause applies to *all persons*, including aliens, whether here legally or illegally, although the nature of that protection may vary depending upon status and circumstances.<sup>100</sup> Accordingly, while due process is

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94. See 8 C.F.R. § 241 (2002). This concern is mitigated by the new INS regulations that require the alien to cooperate with the removal proceedings. *Id.* § 241(e)(2).

95. See *Supreme Court Finds Presumptive Six-Month Limit to Post-Removal Period Detention*, 78 No. 26 INTERPRETER RELEASES 1125, 1132 (2001).

96. See *Zadvydas*, 533 U.S. at 707, 709 (Kennedy, J., dissenting). Another problem Justice Kennedy found with the majority's holding is that the text of § 1231(a)(6) makes no distinction between excludable and deportable aliens, and he was concerned that *Zadvydas* might be read broadly to apply to excludable aliens as well. *Id.* at 710-11.

97. See *id.*

98. See *id.* at 693 (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925); *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958)).

99. See *United States v. Verdugo-Urquidex*, 494 U.S. 259, 269-71 (1990).

100. See *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). Specifically, *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), applied the Due Process Clause to aliens who were subject to a final

afforded to all within the United States, “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>101</sup> Although some level of constitutional protection exists for deportable aliens, the scope and extent of this protection must be determined.

The Government argued that *Shaughnessy v. United States ex rel. Mezei*<sup>102</sup> supported its position.<sup>103</sup> In *Mezei*, a once lawfully admitted alien was refused admission to the United States when returning from abroad and was held indefinitely on Ellis Island because no country would accept him.<sup>104</sup> The Court held that such indefinite detention did not violate the Constitution because the alien, stopped at the border, did not enjoy rights under the Due Process Clause.<sup>105</sup>

## 2. *The Majority’s Approach and Rationale*

The majority declined to extend *Mezei* to deportable aliens by focusing on territorial status; *Mezei* was distinguishable because *Mezei* was “stopped at the border,” while *Zadvydas* and *Ma* were within the United States.<sup>106</sup> The majority reaffirmed the importance of territorial status by maintaining broad constitutional rights for aliens on U.S. soil.<sup>107</sup> Aliens stopped at the border are not protected by the Fifth Amendment and are given virtually no rights under the Constitution, while those within our borders are given broad constitutional protections.<sup>108</sup>

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order of deportation, such as the ones in the instant case. *Zadvydas*, 533 U.S. at 684-85.

101. *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

102. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

103. *Zadvydas*, 533 U.S. at 692.

104. *Mezei*, 345 U.S. at 207-08, 215. Presence on Ellis Island was considered stopped at the border. *Id.*

105. *Id.* at 215.

106. *Zadvydas*, 533 U.S. at 693.

107. *Id.*

108. *Id.* The rationale for this distinction has been criticized as illogical and unfair. See *infra* Section III.B.5. Before *Zadvydas* reinvigorated the territorial distinction, courts had started to undercut *Mezei* and the importance of territorial standing. See *Rosales-Garcia v. Holland*, 238 F.3d 704 (6th Cir. 2001), *vacated sub nom.* *Thoms v. Rosales-Garcia*, 122 S. Ct. 662 (2001). In *Rosales-Garcia*, the Sixth Circuit granted relief on an alien’s habeas petition after discounting *Mezei* on the grounds that

### 3. Justice Kennedy's Approach and Rationale

Justice Kennedy's dissent did not rely upon *Mezei* either, but he disagreed with the majority's reliance upon territorial distinctions.<sup>109</sup> Justice Kennedy argued that such distinctions are only important to procedural rights, in that aliens become deportable through procedures that protect their interest in remaining in the United States, while excludable aliens do not have such an interest.<sup>110</sup> As to substantive rights, he asserted, "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious."<sup>111</sup> He stated that, "it is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community."<sup>112</sup> Hence, Justice Kennedy asserted that the government might detain deportable aliens indefinitely on the grounds of risk of flight or danger to the community.<sup>113</sup> However, this detention must be subject to adequate procedural protections and judicial review to prevent arbitrary or capricious detention.<sup>114</sup>

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the Supreme Court had subsequently extended basic constitutional protections to all aliens and by emphasizing the national security aspects of *Mezei*. *Id.* at 719-22, 727; see *Alien's Successive Habeas Petition Not Saved by Zadvydas, Sixth Circuit Rules*, *supra* note 12, at 1639. After *Zadvydas*, the Sixth Circuit was forced to overrule *Holland* in *Carballo v. Luttrell*, No. 99-5698, 2001 U.S. App. LEXIS 21695, at \*43 (6th Cir. Oct. 11, 2001).

109. *Zadvydas*, 533 U.S. at 719-21 (Kennedy, J., dissenting).

110. *Id.* at 720-21 (Kennedy, J., dissenting). The key difference in the rights extended to removable and excludable aliens may be explained by examining the liberty interests involved; "the removable alien, by virtue of his continued presence here, possesses an interest in remaining, while the excludable alien seeks only the privilege of entry." *Id.* at 721 (Kennedy, J., dissenting). Hence, different procedures are appropriate for removable and excludable aliens. See *id.* (Kennedy, J., dissenting); see also *id.* at 703-04 (Scalia, J., dissenting).

111. *Id.* at 721 (Kennedy, J., dissenting).

112. *Id.* (Kennedy, J., dissenting).

113. See *id.* (Kennedy, J., dissenting).

114. *Id.* (Kennedy, J., dissenting).

#### 4. Justice Scalia's Approach and Rationale

Justice Scalia's dissent accepted the Government's argument that *Mezei* controlled.<sup>115</sup> By treating removable aliens similar to those stopped at the border, he reasoned, the government may, under *Mezei*, hold them indefinitely.<sup>116</sup>

#### 5. Resulting Tiers of Aliens' Constitutional Rights After *Zadvydas*

With three widely varying approaches to removable aliens' constitutional rights, it is not surprising that *Zadvydas* does little to add stability to U.S. immigration law, which, following *Zadvydas*, can be described as a three-tiered system consisting of excludable aliens, deportable aliens, and aliens allowed to remain in the United States.<sup>117</sup>

Excludable aliens, stopped at the border, are in the bottom tier.<sup>118</sup> The majority's reliance upon territorial status to distinguish *Mezei* serves as an endorsement of the constitutional significance of the territorial distinction.<sup>119</sup> This reliance provides no guidance as to the rights of aliens who have not yet gained entry into the United States and affords them only minimal rights.<sup>120</sup> Furthermore, the territorial distinction produces absurd and inequitable results: an alien who crosses our border is given broad constitutional rights, while an alien with substantial U.S. ties stopped at the border is not given any protection.<sup>121</sup> Hence, *Zadvydas*, by reaffirming the reliance upon

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115. *Id.* at 705 (Scalia, J., dissenting).

116. *Id.* at 705 (Scalia, J., dissenting).

117. *See Leading Cases, supra* note 9, at 372.

118. *See id.* at 371-72.

119. *See id.*; Kendall Coffey, *Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 309-10 (2001) (characterizing the deportable/excludable distinction as unfair). Prior to *Zadvydas*, judicial reliance on territorial distinctions and the precedential value of the *Mezei* case were in question. *See, e.g.,* Rosales-Garcia v. Holland, 238 F.3d 704, 718-21 (6th Cir. 2001), *vacated sub nom.* Thoms v. Rosales-Garcia, 122 S. Ct. 662 (2001) (holding that indefinite detention of excluded aliens violated the Fifth Amendment).

120. *See Coffey, supra* note 119, at 309-10.

121. *See id.*

territorial distinctions, provides no direction as to the rights of excludable aliens and leaves them minimal, if any, constitutional protection.<sup>122</sup>

While *Zadvydas* solidifies the constitutional rights of aliens ordered deported, their rights are still subordinate to those of aliens who can legally remain in the United States.<sup>123</sup> By not extending *Mezei* to deportable aliens, *Zadvydas* preserves broad constitutional rights to such aliens; however, their rights remain inferior to the constitutional protections given to aliens allowed to remain in the United States.<sup>124</sup>

#### 6. *Application of Justice Kennedy's "Arbitrary and Capricious" Standard*

The use of the territorial distinction and the resulting tier system is unsound because it blindly elevates deportable aliens' rights above those of excludable aliens and is difficult to implement.<sup>125</sup> Justice Kennedy's approach, which grants all aliens the right to be free from arbitrary and capricious detention, would produce a superior result.<sup>126</sup>

Such an approach would remove the uncertainty surrounding the rights of excludable aliens, eliminate the potential for bizarre results produced by the deportable/excludable distinction, and serve as a less complicated guidepost in the application of immigration law.<sup>127</sup> The exercise of the "arbitrary and capricious" standard would define a floor of protection to be afforded to all persons in the global community and would be consistent with civilized governance.<sup>128</sup> Thus,

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122. See *Leading Cases*, *supra* note 9, at 373.

123. See *id.* at 372.

124. See *id.* at 373.

125. See *id.*; *Coffey*, *supra* note 119, at 309-10.

126. See *Leading Cases*, *supra* note 9, at 372.

127. See *id.* at 372-76.

128. See *id.* at 375-76; *Zadvydas v. Davis*, 533 U.S. 678, 720-21 (2001) (Kennedy, J., dissenting). Accordingly, Justice Kennedy cited United Nations sources concerning the international view on detention of refugees and asylum seekers. *Id.* at 721 (citing *Civil & Political Rights, Including Questions of: Torture & Detention: Report of the Working Group on Arbitrary Detention*, U.N. ESCOR, 56th Sess., U.N. Doc. E/CN.4/2000/4 (1999); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA & STANDARDS RELATING TO THE

Justice Kennedy's approach to aliens' rights is superior to that of the majority because it is more pragmatic, more consistent in application and result, and more in-line with the rights that should be conferred by the United States to all people.<sup>129</sup>

*C. Difficulties with the Presumably Reasonable Period and the Limitations upon the Attorney General*

*1. Background and Rationale of the Majority*

After holding that § 1231(a)(6) contains implicit reasonableness limitations, Justice Breyer elaborated upon how the courts and the Attorney General should review such cases.<sup>130</sup> "In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal."<sup>131</sup> The focus is exclusively on the foreseeability of removal, and once the removal is not reasonably foreseeable, the Attorney General should deem continued detention no longer authorized by the statute.<sup>132</sup>

After establishing the limits of the Attorney General's authority and the scope of judicial review, Justice Breyer retreated from the strict application of these standards in favor of the executive branch's expertise and responsibility concerning immigration.<sup>133</sup> Recognizing executive discretion, the Court established a presumptively reasonable period of detention to

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DETENTION OF ASYLUM SEEKERS (1999)).

129. See *Leading Cases*, *supra* note 9, at 372-76.

130. *Zadvydas*, 533 U.S. at 689.

131. *Id.* at 699.

132. *Id.* at 699-700.

133. *Id.* at 700.

We recognize, as the Government points out, that review must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to "speak with one voice" in immigration matters.

*Id.*

limit when courts can invade INS authority.<sup>134</sup> The period was set at six months past the expiration of the ninety-day removal period.<sup>135</sup> “After this six-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.”<sup>136</sup> Thus, the reasonableness review of the detention considers only the foreseeability of removal with a presumption that detention beyond six months is unreasonable.<sup>137</sup>

## 2. *Potential Problems and Issues Raised by the Review and the Presumption*

As a threshold matter, the precedent for this presumption must be examined. Justice Breyer cited two cases in support of establishing a presumptively reasonable detention period:<sup>138</sup> *Cheff v. Schnackenberg*<sup>139</sup> and *County of Riverside v. McLaughlin*.<sup>140</sup> In *Cheff*, the Court adopted a presumption that a “petty offense” is a crime that imposes a sentence of less than six months,<sup>141</sup> and in *McLaughlin*, the Court held that an arrestee must be arraigned within forty-eight hours of arrest.<sup>142</sup>

The majority’s reliance on these cases is not entirely stable.<sup>143</sup> Employing *Cheff* as precedent to find time-based presumptions in a statute is problematic because the particular statute in *Cheff* affirmatively granted judicial discretion in such cases.<sup>144</sup> The absence of such a grant in *Zadvydas* diminishes the

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134. *Id.* at 700-01.

135. *Id.* at 701.

136. *Id.* Nevertheless, “as the period of prior post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.” *Id.*

137. *Id.* It is not required that the alien be held for six months before the detention is unreasonable; the alien may be released as soon as there is no significant likelihood of removal in the foreseeable future. *Id.*

138. *Id.* at 700-701.

139. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

140. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

141. *Cheff*, 384 U.S. at 379. This case involved contempt charges and whether the petitioner was entitled to a jury trial. *Id.*

142. *McLaughlin*, 500 U.S. at 56-59.

143. *See Zadvydas*, 533 U.S. at 712 (Kennedy, J., dissenting).

144. *Id.* (Kennedy, J., dissenting). Federal courts are given peculiar power to

precedential value of *Cheff*.<sup>145</sup> The application of *McLaughlin* is questionable because it relied on an estimate of the reasonable time needed to perform a necessary predicate task,<sup>146</sup> whereas the “[six]-month period [in *Zadvydas*] bears no particular relationship to how long it now takes to deport” an alien.<sup>147</sup>

In addition to precedential problems, the adoption of the presumptively reasonable period threatens the underlying policy concerns of the statute. These concerns, as the Government advanced, are risk of flight and danger to the community.<sup>148</sup> Regarding the risk of flight justification, Justice Breyer reasoned that, once removal is unforeseeable, the government’s interest in detention diminishes because there is no deportation from which to flee.<sup>149</sup> Justice Kennedy did not seem greatly distressed by this argument, but focused his responses on the danger to the community rationale.<sup>150</sup>

As Justice Kennedy points out, the much more troubling consequence of the presumptively reasonable period is its effect on the government’s ability to control dangers to the community.<sup>151</sup> The six-month period “makes the statutory purpose to protect the community ineffective . . . [because] [t]he risk to the community exists whether or not the repatriation negotiations have some end in sight . . . .”<sup>152</sup> The danger to the community and the foreseeability of removal are not interrelated, and, thus, a detention review that does not consider an alien’s danger to the community counters congressional intent.<sup>153</sup> As Justice Kennedy pointed out, Congress, when enacting § 1231, was aware of the special

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review sentences in contempt cases. *Id.* (Kennedy, J., dissenting).

145. *Id.* (Kennedy, J., dissenting).

146. *Id.* at 712 (Kennedy, J., dissenting). Forty-eight hours was the reasonable time estimated to process the arrestee for arraignment. *Id.* (Kennedy, J., dissenting).

147. *Id.* (Kennedy, J., dissenting).

148. *Id.* at 690.

149. *See id.*

150. *Id.* at 709.

151. *See id.* at 708 (Kennedy, J., dissenting).

152. *Id.* (Kennedy, J., dissenting). Furthermore, the risk may actually increase once an alien becomes aware that he cannot be sent back to another country. *Id.* (Kennedy, J., dissenting).

153. *Id.* (Kennedy, J., dissenting).

challenges of removable aliens who cannot be deported; while § 1231(a)(6) allows the further detention of aliens, § 1231(a)(7), for example, allows released aliens to gain employment.<sup>154</sup> Hence, “Congress’ decision to ameliorate the condition of aliens subject to a final order of removal who cannot be repatriated, but who need not be detained, illustrates a balance in the statutory design.”<sup>155</sup> The Court disrupts this balance by focusing solely on the foreseeability of repatriation and removes the ability of the INS to protect the community from potentially dangerous aliens.<sup>156</sup>

The majority’s holding also hampers the government’s ability to effectuate repatriation. Because the Court has limited the executive branch’s authority, foreign nations may take advantage of this lack of power by ignoring or denying repatriation requests, which will allow dangerous aliens to remain within the United States.<sup>157</sup> Furthermore, aliens and their families may take advantage of this ruling by delaying and obstructing repatriation proceedings because of the potential for freedom after six months.<sup>158</sup> Thus, this judicial intervention will have adverse effects upon the ability of the INS to deport aliens.<sup>159</sup>

Lastly, in the post-September 11, 2001 world, special attention must be given to *Zadvydas*’s effect on the prevention of terrorist attacks. Concerning terrorism, Justice Breyer retreated from his general holding by allowing consideration of preventive detention and “heightened deference to the judgments of the political branches with respect to matters of national security.”<sup>160</sup> Hence, *Zadvydas* does not affect the Attorney

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154. *Id.* at 709 (Kennedy, J., dissenting).

155. *Id.* (Kennedy, J., dissenting).

156. *See id.* at 709 (Kennedy, J., dissenting).

157. *Id.* at 711-12 (Kennedy, J., dissenting).

158. *See id.* at 713 (Kennedy, J., dissenting). This concern is mitigated by INS regulations that make clear that the alien must cooperate with the INS in removal proceedings. *See* 8 C.F.R. § 241.13(e)(2) (2002).

159. *See Zadvydas*, 533 U.S. at 711-13 (Kennedy, J., dissenting). “The Court says it will allow the Executive to perform its duties on its own for six months; after that, foreign relations go into a judicially supervised receivership.” *Id.* at 712 (Kennedy, J., dissenting).

160. *Id.* at 692.

General's power to protect national security.<sup>161</sup> Such a concession to the executive branch is consistent with the danger to the community rationale of the statute; however, the inconsistency of this exception is troubling.<sup>162</sup> "The Court ought not to reject a rationale in order to deny power to the Attorney General and then invoke the same rationale to save its own analysis."<sup>163</sup> By not disturbing the Attorney General's discretion to hold terrorists indefinitely, the Court most likely mitigated a great deal of the criticism of *Zadvydas* in this period of heightened awareness and passion for such issues; however, by approving this exception, Breyer weakens the foundation of his general holding.<sup>164</sup>

The imposition of the presumptively reasonable period rests upon weak precedential footing, and the results of such a presumption and the scope of review mandated by the Court will adversely affect the purposes of the statute.<sup>165</sup> With such debate concerning *Zadvydas's* potential adverse effects, judicial, administrative, and legislative reactions to this case are of paramount importance when evaluating *Zadvydas's* lasting impact on U.S. immigration laws.

#### IV. DEVELOPMENTS IN THE LAW POST-ZADVYDAS

##### A. *Judicial Attempts to Expand Zadvydas's Holding*

Subsequent to *Zadvydas*, aliens have petitioned courts to extend Justice Breyer's holding to their cases.<sup>166</sup> One proposed expansion was to impose reasonableness limitations upon INS detention of inadmissible aliens.<sup>167</sup> Aliens have also attempted to

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161. See *id.* at 689; *Supreme Court Finds Presumptive Six-Month Limit to Post-Removal Period Detention*, *supra* note 95, at 1129.

162. See *Zadvydas*, 533 U.S. at 714-15 (Kennedy, J., dissenting).

163. *Id.* at 715 (Kennedy, J., dissenting).

164. See *id.* at 714-15 (Kennedy, J., dissenting).

165. See *id.* at 705-18 (Kennedy, J., dissenting).

166. See, e.g., *Nodarse v. United States*, 166 F. Supp. 2d 538 (S.D. Tex. 2001) (attempting to extend *Zadvydas* to excludable aliens); *Badio v. United States*, 172 F. Supp. 2d 1200 (D. Minn. 2001) (attempting to extend *Zadvydas* to aliens detained during removal proceedings).

167. See *Carballo v. Luttrell*, No. 99-5698, 2001 U.S. App. LEXIS 21695, at \*39

extend the limitations of *Zadvydas* to pre-removal detention.<sup>168</sup> While courts have denied the majority of such attempts,<sup>169</sup> multiple circuit courts, relying on *Zadvydas*, have afforded greater protections to aliens.<sup>170</sup>

1. *Zadvydas's Effect upon the Detention of Inadmissible Aliens*

Initial attempts to extend *Zadvydas* to inadmissible/excludable aliens failed.<sup>171</sup> Prior to *Zadvydas*, there were some questions regarding judicial reliance on territorial distinctions and the precedential value of the *Mezei* case.<sup>172</sup> For example, in the pre-*Zadvydas* case *Rosales-Garcia v. Holland*, the Sixth Circuit granted relief on the habeas petition of an excludable alien by limiting *Mezei* to its facts.<sup>173</sup> This limitation was considered appropriate because the Supreme Court had recently extended aliens greater constitutional protections and because *Mezei* related to national security.<sup>174</sup> However, after *Zadvydas*, the Sixth Circuit overruled *Holland* because it rested on the assumptions that the excludable/deportable distinction was not constitutionally significant and that *Mezei* was no longer good law.<sup>175</sup> *Zadvydas* conflicted with both of these assumptions,<sup>176</sup>

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(6th Cir. Oct. 11, 2001); *Nodarse*, 166 F. Supp. 2d at 544-46; *Alien's Successive Habeas Petition Not Saved by Zadvydas*, *Sixth Circuit Rules*, *supra* note 12, at 1639-40 (discussing *Carballo's* and *Zadvydas's* reliance on territorial distinctions).

168. See, e.g., *Badio*, 172 F. Supp. 2d at 1204; *Yanez v. Holder*, 149 F. Supp. 2d 485, 494 (N.D. Ill. 2001).

169. See, e.g., *Nodarse*, 166 F. Supp. 2d at 545; *Carballo*, 2001 U.S. App. LEXIS 21695, at \*38-43; *Badio*, 172 F. Supp. 2d at 1204.

170. See, e.g., *Patel v. Zemski*, 275 F.3d 299, 310-12 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002); *Xi v. INS*, 298 F.3d 832, 833-34 (9th Cir. 2002).

171. See, e.g., *Alien's Successive Habeas Petition Not Saved by Zadvydas*, *Sixth Circuit Rules*, *supra* note 12, at 1639-40.

172. See, e.g., *Rosales-Garcia v. Holland*, 238 F.3d 704, 717-21 (6th Cir. 2001), *vacated sub nom.* *Thoms v. Rosales-Garcia*, 122 S. Ct. 662 (2001) (holding that indefinite detention of excludable aliens violated the Fifth Amendment).

173. *Alien's Successive Habeas Petition Not Saved by Zadvydas*, *Sixth Circuit Rules*, *supra* note 12, at 1637-39.

174. *Id.*; *Rosales-Garcia*, 238 F.3d at 719 (citing *Reno v. Flores*, 507 U.S. 292 (1993); *Plyler v. Doe*, 457 U.S. 202 (1982); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Graham v. Richardson*, 403 U.S. 365 (1971); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

175. *Carballo v. Luttrell*, No. 99-5698, 2001 U.S. App. LEXIS 21695, at \*23, \*38

and the Sixth Circuit had no choice but to allow potentially indefinite detention of excludable aliens.<sup>177</sup> Justice Breyer clearly supported the territorial distinctions,<sup>178</sup> and multiple courts have interpreted *Zadvydas* to stand for a denial, not an enlargement, of rights to inadmissible aliens.<sup>179</sup>

The Ninth Circuit reached a different conclusion. A divided three-judge panel extended the reach of *Zadvydas* to inadmissible aliens.<sup>180</sup> In *Xi v. INS*, the majority held that the petitioner, an alien never legally admitted into the United States, fell “squarely within the ambit of § 1231(a)(6) and, consequently, within the Supreme Court’s holding in *Zadvydas*.”<sup>181</sup> The court reasoned that § 1231(a)(6) “does not draw any distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability. On its face, the statute applies symmetrically to [the various] classes of aliens.”<sup>182</sup> As anticipated by Justice Kennedy’s dissent, the court found that “the Supreme Court’s categorical interpretation, leaves us little choice but to conclude that *Zadvydas* applies to inadmissible individuals.”<sup>183</sup>

With this split in the circuit courts as to whether the *Zadvydas* decision extends to inadmissible aliens, further clarification from the Supreme Court is anticipated.

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(6th Cir. Oct. 11, 2001).

176. *See id.* at \*42-43.

177. *Id.* at \*43.

178. *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001).

179. *See Carballo*, 2001 U.S. App. LEXIS 21695, at \*41; *Nodarse v. United States*, 166 F. Supp. 2d 538, 545 (S.D. Tex. 2001) (denying relief to excludable aliens by relying on *Mezei*).

180. *Xi v. INS*, 298 F.3d 832, 833-34 (9th Cir. 2002).

181. *Id.*

182. *Id.* at 834.

183. *Id.* at 836. The majority dismissed the effect of the Supreme Court’s discussion of *Mezei* and its territorial distinctions. *Id.* at 837-39; *see id.* at 840-41 (Rymer, J., dissenting).

## 2. *Limitations upon Detention Before the Removal Determination*

Aliens have also attempted to extend *Zadvydas*'s reasonableness limitations to pre-removal detention.<sup>184</sup> Such detention is governed by § 1226(c), which mandates the confinement of criminal aliens during removal proceedings.<sup>185</sup> Prior to *Zadvydas*, courts were split on the constitutionality of § 1226(c).<sup>186</sup> After *Zadvydas* affirmed the constitutional rights of removable aliens, some have argued that *Zadvydas* must be read broadly enough to encompass pre-removal detention.<sup>187</sup>

Some aliens have argued that *Zadvydas* directly requires reasonableness limitations in regard to their pre-removal detention.<sup>188</sup> However, these direct assaults upon § 1226(c) have failed because Justice Breyer made clear in the majority opinion that such a reading is inappropriate.<sup>189</sup> Concentrating on the dilemma of indefinite detention, the Court distinguished post-removal period detention from "detention . . . during the subsequent ninety-day removal period," finding that only post-removal detention may last indefinitely.<sup>190</sup> *Zadvydas* does not directly impose reasonableness limitations upon pre-removal detention because such confinement has a foreseeable termination point, and is therefore, in the Court's opinion, distinguishable.<sup>191</sup>

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184. See, e.g., *Badio v. United States*, 172 F. Supp. 2d 1200, 1204 (D. Minn. 2001); *Yanez v. Holder*, 149 F. Supp. 2d 485, 494-95 (N.D. Ill. 2001).

185. 8 U.S.C. § 1226(c)(1)(B) (Supp. V 1994). "The Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense covered in § 1227(a)(2)(A)(i), (A)(iii), (B), (C), or (D) of this title . . ." *Id.*; *Badio*, 172 F. Supp. 2d at 1202-03.

186. *Badio*, 172 F. Supp. 2d at 1205 n.3 (citing various district court decisions that reach different conclusions about § 1226(c)). *Parra v. Parryman* was the only circuit court opinion on this issue to uphold the constitutionality of mandatory no-bail detention. *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999).

187. See, e.g., *Badio*, 172 F. Supp. 2d at 1204.

188. See, e.g., *id.*

189. See *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001).

190. *Id.*; see *Badio*, 172 F. Supp. 2d at 1204-05.

191. See *Badio*, 172 F. Supp. 2d at 1204-05; *Yanez v. Holder*, 149 F. Supp. 2d 485, 494-95 (N.D. Ill. 2001). "[A]s found by the [*Zadvydas*] Court, aliens held pursuant

Nevertheless, while *Zadvydas* does not directly apply to § 1226(c) detention, it allows constitutional limitations upon congressional power and affirms broad constitutional rights to deportable aliens.<sup>192</sup> As a result, aliens have asked court to reevaluate this mandatory pre-removal detention under the framework of *Zadvydas*'s constitutional analysis.<sup>193</sup> Under this examination, the constitutional inquiry becomes whether the detention is regulatory in nature and not excessive in purpose.<sup>194</sup>

Applying this test, post-*Zadvydas* courts have come to different conclusions as to whether this mandatory detention is excessive, and therefore, unconstitutional.<sup>195</sup> Some courts have upheld § 1226(c) by ruling that "the means that Congress chose to further its legislative regulatory goals are not excessive."<sup>196</sup> These courts have found that the constitutional requirements of "fairness" are fulfilled when weighing aliens' diminished liberty interest against the government's interest in preventing flight and protecting the community.<sup>197</sup> Furthermore, these decisions illustrate that comprehensive administrative procedures are in place to protect against erroneous application of § 1226(c).<sup>198</sup>

Nonetheless, the first two federal courts of appeals to consider this detention since *Zadvydas* have ruled that § 1226(c)

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to § 1226 have a foreseeable detention termination point, and aliens held pursuant to § 1231 do not. Accordingly, [*Zadvydas*] does not control the present case nor lend support to petitioners' argument." *Id.* at 495. A similarly notable case is *Guner v. Reno*, No. 00 Civ. 8802(DC), 2001 WL 940576, at \*2 (S.D.N.Y. Aug. 20, 2001). In *Guner*, an alien being held past the ninety-day removal period attempted to be released under *Zadvydas* as he challenged his final order of deportation. *Id.* The court found that *Zadvydas* did not directly apply because the alien's challenges were the cause of the delay in deportation and there was no showing that the Government would not be able to remove the petitioner in a reasonable period once the appeals were exhausted. *Id.*

192. See *Badio*, 172 F. Supp. 2d at 1204-05 (referencing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

193. See, e.g., *Yanez*, 149 F. Supp. 2d at 493; *Badio*, 172 F. Supp. 2d at 1205; *Patel v. Zemski*, 275 F.3d 299, 310 (3d Cir. 2001).

194. See *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Zadvydas*, 533 U.S. at 688-93; *Patel*, 275 F.3d at 310-11; *Yanez*, 149 F. Supp. 2d at 493.

195. Compare *Yanez*, 149 F. Supp. 2d at 493 (upholding § 1226(c)), with *Patel*, 275 F.3d at 312 (finding § 1226(c) unconstitutional).

196. *Yanez*, 149 F. Supp. 2d at 493; see *Badio*, 172 F. Supp. 2d at 1206.

197. *Yanez*, 149 F. Supp. 2d at 493-94; *Badio*, 172 F. Supp. 2d at 1206-07.

198. *Badio*, 172 F. Supp. 2d at 1207.

is unconstitutional.<sup>199</sup> Explicitly relying on *Zadvydas*'s affirmation of removable aliens' fundamental liberty interest, these courts have applied a "heightened due process scrutiny to determine if the statute's infringement on that [liberty interest] is narrowly tailored to serve a compelling state interest."<sup>200</sup> After examining the government's interest in preventing flight and protecting the community, the courts found that there was no basis "to conclude that the goals articulated by the government [were] sufficient to justify detention without individualized hearings."<sup>201</sup> These courts held that mandatory detention of removable aliens pending their removal violates their due process rights absent an opportunity for a hearing to determine that they pose a risk of flight or a danger to the community.<sup>202</sup>

Underscoring *Zadvydas*'s importance in this determination is that the courts disregarded pre-*Zadvydas* precedent; each court stated that the earlier cases were decided without the benefit of *Zadvydas*'s analysis of these constitutional concerns.<sup>203</sup> The *Zadvydas* decision has persuaded some circuit courts to invalidate a federal immigration law, thereby causing a split in the circuit courts.<sup>204</sup> This split in the circuits may compel the Supreme Court to rule again upon the rights of deportable aliens.

*B. Administrative Adjustments to Implement Zadvydas's Holding*

In light of *Zadvydas*, the INS has enacted interim rules that amend the custody review process governing the detention of aliens ordered removed from the United States and attempted to preserve the Attorney General's authority.<sup>205</sup> These new rules

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199. *Patel*, 275 F.3d at 312-13; *Kim v. Ziglar*, 276 F.3d 523, 533-35 (9th Cir. 2002).

200. *Patel*, 275 F.3d at 310; see *Kim*, 276 F.3d at 530.

201. *Patel*, 275 F.3d at 311; see *Kim*, 276 F.3d at 534.

202. See *Patel*, 275 F.3d at 312-13; *Kim*, 276 F.3d at 539.

203. See *Patel*, 275 F.3d at 313; *Kim*, 276 F.3d at 537 (distinguishing *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999)).

204. Compare *Patel*, 275 F.3d 299, and *Kim*, 276 F.3d 523, with *Parra*, 172 F.3d 954.

205. 8 C.F.R. § 241 (2002); see *INS Interim Rule Amends Custody Review*

control the determination of the likelihood of removal in the reasonably foreseeable future and whether special circumstances justify continued detention.<sup>206</sup> Additionally, the new rules provide for an extension of the removal period beyond ninety days if an alien acts in a manner that prevents or hinders his removal from the United States.<sup>207</sup> While the Court's decision mandated such amendments, the INS interpreted *Zadvydas* in a manner that preserved the executive branch's ability to exert control over the removable aliens.<sup>208</sup> Indeed, the new regulations are consistent with the language of *Zadvydas*, while supporting the executive branch's broad power over immigration matters.<sup>209</sup>

The new procedures are contained in 8 C.F.R. § 241.13, which controls the custody determination of a detained alien after the expiration of the removal period.<sup>210</sup> The new rules emphasize the executive branch's expertise and experience in the deportation of aliens; the INS makes clear that the executive branch will continue to maintain significant, independent discretion and power in this area.<sup>211</sup> Furthermore, the regulations clarify that the responsibility of repatriation is shared jointly with the alien, who is required to assist and work diligently towards his removal.<sup>212</sup>

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*Process for Continued Detention of Aliens Subject to Final Orders of Removal, Pursuant to Zadvydas*, 78 No. 45 INTERPRETER RELEASES 1777 (Nov. 19, 2001).

206. See *INS Interim Rule Amends Custody Review Process for Continued Detention of Aliens Subject to Final Orders of Removal, Pursuant to Zadvydas*, *supra* note 205, at 1777.

207. See *id.*

208. See 8 C.F.R. § 241.

209. See *id.*

210. *Id.* § 241.13.

211. See *id.*

The Court emphasized in its decision the need to "take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need 'to speak with one voice' in immigration matters."

Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,968 (Nov. 14, 2001) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001)).

212. See 8 C.F.R. § 241; *INS Interim Rule Amends Custody Review Process for Continued Detention of Aliens Subject to Final Orders of Removal, Pursuant to Zadvydas*, *supra* note 205, at 1779.

Under the new rules, detention of an alien during the post-removal period will generally be governed by 8 C.F.R. § 241.4, a pre-*Zadvydas* regulation allowing the release of aliens that are not a flight risk or a danger to the community.<sup>213</sup> If the alien is not released under 8 C.F.R. § 241.4, the alien may petition the INS under 8 C.F.R. § 241.13 to determine whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future.<sup>214</sup> This petition may be made anytime after the removal order is final, but the INS is afforded an opportunity, during the six-month presumptively reasonable period, to assess the merits of the petitioner's claims.<sup>215</sup> If the INS finds that there is not a significant likelihood that the alien will be removed in the reasonably foreseeable future, the INS generally will be required to release the alien as mandated by *Zadvydas*.<sup>216</sup>

Despite requiring release, the INS has attempted to decrease the number of aliens released to diminish the danger those aliens pose to the community.<sup>217</sup> The regulation states that the INS is "keenly aware of the need to minimize [risk of flight and danger to the community] whenever possible, through the imposition of appropriate conditions of release for those aliens who can no longer be detained."<sup>218</sup> Accordingly, 8 C.F.R. § 241.13 imposes stringent parole conditions on released aliens, and if a released alien breaches the conditions, the INS may detain him for another six months.<sup>219</sup> Through these strict parole

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213. See 8 C.F.R. § 241. Under section 241.4, there is no inquiry into the likelihood of removal. See *id.* § 241.4.

214. See *id.* § 241.4(i)(7). This relief is available to all removable aliens and those excludable aliens who have been convicted of a felony. See *id.*

215. *Id.* § 241.13. The petitioner must first show that he has cooperated with the removal efforts to receive relief under section 241.13. *Id.* The additions to the regulations make clear that an alien may not use delay tactics to cause his release. *Id.* Indeed, section 241.4 has been amended to extend the removal period if the alien does not fully cooperate with the removal efforts. *Id.* § 241.4(g).

216. *Id.* § 241.13. The alien may be re-detained if there is a change in circumstances that makes removal foreseeable. *Id.* § 241.13(i). Such detention would be governed by section 241.4. *Id.*

217. *Id.* § 241.14.

218. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,971 (Nov. 14, 2001).

219. 8 C.F.R. § 241.13(h)-(i). The INS points to the Court's discussion of the

requirements, the INS is able to further the goals of the statute, and maintain control over aliens despite *Zadvydas*.<sup>220</sup>

The new regulations also include a provision that allows the INS to continue detention of certain removable aliens despite the unforeseeability of removal.<sup>221</sup> Under 8 C.F.R. § 241.14, continued detention is allowed in situations when the risk to the public is particularly strong and when no condition of release could avoid the danger posed to the public.<sup>222</sup> The situations considered are: highly contagious diseases; foreign policy concerns; national security and terrorism; and individuals who are “specially” dangerous due to a mental condition or personality disorder.<sup>223</sup> While the Court’s opinion clearly allowed the Attorney General greater discretion regarding national security and terrorist concerns,<sup>224</sup> the opinion did not directly grant such broad discretion regarding preventive detention for the aliens who pose a particularly strong risk to the public.<sup>225</sup> Nevertheless, the INS regulations are consistent with *Zadvydas* and are an appropriate measure when considering the legislative goal of community protection.<sup>226</sup> By promulgating regulations that interpret *Zadvydas* in this manner, the INS is able to maintain control over these dangerous aliens, despite the unforeseeability of their removal.<sup>227</sup>

Attorney General John Ashcroft released a memo shortly after the release of *Zadvydas*, which stated that the Court’s

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alien’s diminished liberty interest as support for these mandatory parole restrictions. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,971.

220. See *INS Interim Rule Amends Custody Review Process for Continued Detention of Aliens Subject to Final Orders of Removal, Pursuant to Zadvydas*, *supra* note 205, at 1780.

221. 8 C.F.R. § 241.14.

222. *Id.*

223. *Id.* § 241.14(b)-(f).

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

225. See *id.* at 691-92. This preventive detention was only discussed in dicta concerning the potentiality of a constitutional problem. *Id.* at 696.

226. See Continued Detention of Aliens Subject to Final Order of Removal, 66 Fed. Reg. 56,967, 56,972 (Nov. 14, 2001); 8 C.F.R. § 241.14.

227. See 8 C.F.R. § 241.14; *INS Interim Rule Amends Custody Review Process for Continued Detention of Aliens Subject to Final Orders of Removal, Pursuant to Zadvydas*, *supra* note 205, at 1780.

decision would “inevitably result in anomalies in which individuals who have committed violent crimes will be released from detention simply because their country of origin refuses” to take them back.<sup>228</sup> Despite this dire warning, the INS has effectively worked, within the language of *Zadvydas*, to maintain control over aliens and accomplish the goals of the statute by protecting the community from aliens who pose a particularly strong risk and imposing mandatory parole restrictions upon released aliens.<sup>229</sup>

### C. Congressional Response in the USA Patriot Act

In response to the terrorist attacks of September 11, 2001, Congress addressed issues related to immigration and national security in the USA Patriot Act.<sup>230</sup> This Act partially adopted *Zadvydas*'s holding; it requires the release of certain removable aliens after six months.<sup>231</sup> However, it differs by allowing the Attorney General to deny such relief if the alien is found to be a danger to the community or any person.<sup>232</sup> Therefore, the Act mirrors the Court's holding concerning the presumably reasonable period, but it returns discretion to the Attorney General by allowing him to consider the danger to the community factor when contemplating the release of an alien.<sup>233</sup>

The discretion allowed by the USA Patriot Act, however, is limited to the narrow class of aliens affected by this anti-terrorism legislation; only aliens with some connection to national security or terrorist concerns are considered.<sup>234</sup> Because *Zadvydas* did not disturb the Attorney General's discretion over such aliens, this aspect of the USA Patriot Act does not

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228. *Attorney General Issues Interim Procedure for Post-Order Review After Zadvydas*, 78 No. 29 INTERPRETER RELEASES 1228 (July 30, 2001).

229. *See* 8 C.F.R. §§ 241.4, 241.13, 241.14; *INS Interim Rule Amends Custody Review Process for Continued Detention of Aliens Subject to Final Orders of Removal, Pursuant to Zadvydas*, *supra* note 205, at 1780.

230. Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act), Pub. L. No 107-56, 115 Stat. 272 (to be codified in scattered sections of 8 U.S.C.).

231. 8 U.S.C.A. § 1226A (2002) (not yet codified in U.S.C.).

232. *Id.*

233. *Id.*

234. *Id.* § 1226A(a)(3) (listing the classes of aliens affected by the Act).

drastically affect the law.<sup>235</sup> Nevertheless, this provision serves as an indication of positive congressional support for reasonableness limitations and for the six-month presumptively reasonable period.<sup>236</sup> Similarly, the Act provides support for consideration of the danger to the community factor, an aspect of § 1231 that Justice Breyer disregarded.<sup>237</sup> Community safety was clearly important to the drafters of § 1231,<sup>238</sup> and the USA Patriot Act reaffirms the need for contemplation of the danger to the community factor.<sup>239</sup>

Thus, although Congress has not yet directly responded to *Zadvydas*, provisions in the USA Patriot Act can be seen as both an acceptance of reasonableness limitations and a rejection of the Court's prohibition of extended detention of aliens who pose a danger to the community.<sup>240</sup> This prohibition, which greatly troubled the dissenting Justices,<sup>241</sup> is contrary to the goals of the § 1231<sup>242</sup> and seemed to be out of favor with the 107th Congress, especially in the security-conscious post-September 11 world.<sup>243</sup>

## V. CONCLUSIONS

### A. *Difficulties with the Majority's Opinion*

The Supreme Court in *Zadvydas* found that the detention of aliens held during the post-removal period was subject to reasonableness limitations;<sup>244</sup> however, this holding, its rationale, and its implications are problematic.

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235. See *Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (creating a terrorism/national security exception to the majority's holding).

236. See *Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills*, *supra* note 25, at 1593.

237. See *Zadvydas*, 533 U.S. at 707 (Kennedy, J., dissenting).

238. See *id.* at 690 (citing Respondents' Brief at 24, *Zadvydas v. Davis* (No. 99-7791)).

239. 8 U.S.C.A. § 1226A (not yet codified in U.S.C.).

240. See *Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills*, *supra* note 25, at 1593.

241. See *Zadvydas*, 533 U.S. at 707-08 (Kennedy, J., dissenting).

242. See *id.* (Kennedy, J., dissenting).

243. See *Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills*, *supra* note 25, at 1593.

244. *Zadvydas*, 533 U.S. at 707-08 (Kennedy, J., dissenting).

The Court improperly avoided the constitutional issues by adopting an implausible statutory construction that is contrary to the law's plain language, disregards congressional intent, and results in odd and unintended consequences.<sup>245</sup>

Furthermore, as a result of the Court's affirmation of territorial distinctions, the current state of immigration law is a cumbersome, three-tiered system<sup>246</sup> that produces absurd and inequitable results and is difficult to implement.<sup>247</sup> Justice Kennedy's "arbitrary and capricious" standard is superior because the standard eliminates bizarre outcomes, acts as a less complicated guidepost, and aligns U.S. law with international views on this subject.<sup>248</sup>

Lastly, the creation of the presumptively reasonable period and the scope of review allowed are problematic because the presumptively reasonable period is based on weak precedent<sup>249</sup> and the scope of review will hinder the goals of the statute.<sup>250</sup>

#### B. *Developments in the Law Subsequent to Zadvydas*

All three branches of government have responded to the *Zadvydas* decision. The judicial branch has been generally unreceptive to attempts to directly extend *Zadvydas*,<sup>251</sup> but multiple circuit courts have used the reasoning in *Zadvydas* to expand the rights of aliens.<sup>252</sup> With varying results in the circuits, the importance of the *Zadvydas* decision becomes evident as the federal appellate courts contemplate the scope of *Zadvydas* and the constitutionality of federal immigration laws.

The executive branch, through the INS, has enacted new rules that allow extensive control over aliens within the confines

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245. *Id.* at 707-10 (Kennedy, J., dissenting).

246. *See Leading Cases*, *supra* note 9, at 374.

247. *See id.*; Coffey, *supra* note 119, at 309-10.

248. *See Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting); *Leading Cases*, *supra* note 9, at 372.

249. *See Zadvydas*, 533 U.S. at 711-14 (Kennedy, J., dissenting).

250. *See id.* at 707-08 (Kennedy, J., dissenting).

251. *See Alien's Successive Habeas Petition Not Saved by Zadvydas*, *Sixth Circuit Rules*, *supra* note 12, at 1639-40.

252. *See, e.g., Patel v. Zemski*, 275 F.3d 299, 310 (3d Cir. 2001).

of *Zadvydas*.<sup>253</sup> This control is achieved by mandatory parole restrictions<sup>254</sup> and by continued detention of certain classes of dangerous aliens.<sup>255</sup>

In the USA Patriot Act,<sup>256</sup> Congress showed some approval for *Zadvydas*'s presumptively reasonable detention period, but seemed to reject the Court's prohibition of extended detention of aliens who pose a danger to the community.<sup>257</sup> Nevertheless, Congress has yet to directly respond to *Zadvydas*, and the lasting impact of this case upon U.S. immigration law remains to be seen.

*Rob Reckers\**

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253. 8 C.F.R. § 241 (2002).

254. See *INS Interim Rule Amends Custody Review Process for Continued Detention of Aliens Subject to Final Orders of Removal, Pursuant to Zadvydas*, *supra* note 205, at 1780.

255. 8 C.F.R. § 241.14.

256. 8 U.S.C.A. § 1226A (2002) (not yet codified in U.S.C.).

257. See *Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills*, *supra* note 25, at 1593.

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