

# Comment

## Detention of Non-Citizens: The Supreme Court's Muddling of an Already Complex Issue

Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tossed to me,  
I lift my lamp beside the golden door!<sup>1</sup>

— Emma Lazarus

### I. INTRODUCTION

Emma Lazarus's poem was engraved on a plaque and affixed to the base of the Statue of Liberty in 1903. Ms. Lazarus's words may have reflected the sentiment of the country in 1903, but the United States no longer throws its doors open to any and every person hoping for a better life. Rather, potential immigrants are faced with a labyrinth of legal hurdles in order to gain entry into the United States.

Under current U.S. immigration law, every person in the world is either a United States "national" or an "alien." With few exceptions, the

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1. EMMA LAZARUS, THE NEW COLOSSUS (1903).

term national today basically means citizen. Within the class of aliens, or “noncitizens,” the most fundamental distinction drawn by the immigration laws is between immigrants and nonimmigrants. The Immigration and Nationality Act (“INA”) defines nonimmigrants as those who are temporary entrants, such as tourists and students.<sup>2</sup> Every other type of potential entrant is referred to as an “immigrant.” The term immigrant includes noncitizens who have been lawfully admitted as residents (“LPRs”)<sup>3</sup> and those who have not (“undocumented immigrants”). LPRs may reside in the United States permanently and may work.

Regardless of whether a noncitizen seeks admission as a nonimmigrant or an immigrant, in order to simply proceed past the United States border, the noncitizen must clear a number of statutory hurdles. Also, the noncitizen must not fall within any of the various “inadmissibility” grounds. Inadmissibility grounds include, for example, grounds that relate to crime, national security, health, or public assistance. If deemed inadmissible, the noncitizen is termed “excludable” and will not be able to enter the United States. He will be denied entry at the border unless he can obtain a waiver that will grant him temporary admission—referred to as parole.<sup>4</sup> Even if paroled, the noncitizen still carries the label of being inadmissible unless he obtains a discretionary status change from the Attorney General. If no parole is granted to the noncitizen, he will be deemed “removable” from the United States and will be returned to the country from which he came.<sup>5</sup>

If a noncitizen clears the inadmissibility hurdle and obtains admission to the United States, the noncitizen is also subject to removal based on the different grounds of “deportability.” These grounds include criminal behavior, health concerns, national security concerns, and grounds to secure the integrity of the immigration inspection system itself. In most cases, when nonimmigrants already in the United States are removed, it is usually because they simply overstayed. Immigrants, such as LPRs, can also be deported for conduct or circumstances not concerned with the immigration system itself, typically a criminal conviction.<sup>6</sup>

Finally, if a noncitizen is subject to removal by virtue of being excludable or deportable, various provisions of the INA subject the noncitizen to detention. It is possible under certain scenarios for the

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2. 8 U.S.C §§ 101-1175 (2000).

3. LPR is an acronym that stands for lawful permanent resident.

4. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 11 (2002 & Supp. 2003).

5. *Id.*

6. *Id.*

detention to continue indefinitely. Additionally, detention provisions differ as to the mandatory or discretionary nature of the detention.

A. *Recent Supreme Court Noncitizen Detention Cases*

Over the last four years, the Supreme Court has addressed noncitizen detention in three significant cases. The first case, *Zadvydas v. Davis*,<sup>7</sup> held that deportable aliens with criminal records may not be detained indefinitely when their countries of origin refuse their return, despite their potential danger to the community.<sup>8</sup> A narrow 5-4 majority, in which Justice O'Connor provided the fifth vote, based its decision on constitutional concerns in part, but ultimately struck down indefinite detention of deportable noncitizens in the name of statutory construction.<sup>9</sup> Although some commentators believed *Zadvydas* was important because of potential due process protections,<sup>10</sup> the more significant aspect of the case was its apparent reiteration of the historical distinction between a noncitizen who has "effected an entry into the United States and one who has never entered."<sup>11</sup> This distinction refers to noncitizens who have cleared the inadmissibility hurdle versus those who have not, a distinction that has been criticized as logically inseparable.<sup>12</sup> Thus, *Zadvydas* prohibited indefinite detention of a deportable, admissible, noncitizen notwithstanding the noncitizen being determined removable and the noncitizen's potential risk of flight and danger to the public.

The second case is *Clark v. Martinez*,<sup>13</sup> in which the Court extended its holding in *Zadvydas* to prohibit indefinite detention of inadmissible aliens as well.<sup>14</sup> However, the Court in *Clark* made no mention of constitutional concerns at all. Rather, the Court held the same statute that it determined did not allow indefinite detention in *Zadvydas* applied to inadmissible aliens as well.<sup>15</sup> This case was a much stronger 7-2 majority because, as Justice Kennedy predicted in his dissent in *Zadvydas*, the statutory language at issue treated inadmissible and

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7. 533 U.S. 678 (2001).

8. *Id.* at 699.

9. *Id.* at 696-98.

10. See Susan Marx, *Throwing Away the Key: The Constitutionality of the Indefinite Detention of Inadmissible Aliens*, 35 TEX. TECH L. REV. 1259 (2004); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47 (2001).

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

12. LEGOMSKY, *supra* note 4, at 48; see *Zadvydas*, 533 U.S. at 720.

13. 543 U.S. 371 (2005).

14. *Id.* at 386.

15. *Id.*

deportable noncitizens alike.<sup>16</sup> Essentially, once *Zadvydas* was decided, the ruling in *Clark* was unavoidable, despite the Court's declaration in *Zadvydas* that the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."<sup>17</sup> *Clark* leaves unanswered what due process rights an inadmissible alien may have because the Court in *Clark*, unlike the Court in *Zadvydas*, made no mention of due process rights at all in ruling that inadmissible aliens may not be detained indefinitely.

The third case is *Demore v. Hyung Joon Kim*.<sup>18</sup> In *Demore*, another narrow 5-4 majority, in which Justice O'Connor provided the fifth swing vote, the Court upheld the practice of mandatory detention while a noncitizen's removal hearing is pending.<sup>19</sup> In upholding the practice of mandatory detention, the Court approved Congress's use of a proxy—whether the person has been convicted of an "aggravated felony"—to gauge the noncitizen's likelihood of appearance at a removal hearing and dangerousness to the public.<sup>20</sup> Interestingly, similar rationale for *indefinite* detention was rejected by the Court in *Zadvydas*.

These three cases created more new issues than they settled. First, although *Zadvydas* prohibited indefinite detention of a deportable alien, the Court appeared to reinforce a historical distinction between inadmissible aliens and admissible aliens. Yet, in *Clark*, the Court held that the same statute in *Zadvydas* applied equally to inadmissible aliens and rejected the government's proxy—dangerousness—for indefinite detention.<sup>21</sup> Although the statute at issue in *Zadvydas* and *Clark* demanded the result reached in *Clark*, it is unclear whether Congress could simply amend the statute to explicitly treat inadmissible aliens differently from admissible aliens. Finally, the majority in *Demore* muddied the noncitizen detention issue even more by accepting Congress's proxy for mandatory detention, rather than requiring an individual determination that each noncitizen should be detained. In light of these issues, the Court should have addressed whether indefinite detention of inadmissible noncitizens is permitted by the Constitution, just like the Court stated that indefinite detention of an admissible noncitizen is not. In addition, the Court should have determined what

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16. *Id.* at 379.

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

18. 538 U.S. 510 (2003).

19. *Id.* at 531.

20. *Id.* at 520-21.

21. *Id.* at 527-28.

due process rights noncitizens, admissible or inadmissible, actually have when it comes to detention, mandatory, indefinite, or otherwise.

This Comment explores the statutory and constitutional problems that exist as a result of *Zadvydas*, *Demore*, and to a lesser extent *Clark*. Part II provides a historical background and explanation of applicable immigration law. Part III discusses the Supreme Court's decisions in *Zadvydas*, *Clark*, *Demore*, a predecessor case *Shaughnessy v. United States ex rel. Mezei*,<sup>22</sup> and the statutory and constitutional relationships between these cases. Part IV provides an analysis of the interplay between the three main cases and their progeny. This Comment concludes that these three cases leave significant questions as to noncitizen detention and that, ultimately, noncitizen detention serves a critical public safety purpose if imposed within a due process framework.

## II. BACKGROUND

In order to understand the issues involved regarding the legality of noncitizen detention, the statutory framework that makes up immigration law must be explored. In the United States today, immigration law is almost entirely a federal body of law.<sup>23</sup> Over the last century, Congress has enjoyed exceptionally broad power to regulate immigration.<sup>24</sup> In 1893, the Supreme Court observed that the federal government is "vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."<sup>25</sup> The Court also proclaimed that the "power of Congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers . . ."<sup>26</sup> More recently, the Court has stated that with respect to immigration cases, the role of the court "is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy."<sup>27</sup> This broad power has often been referred to as Congress's "plenary power" over immigration.<sup>28</sup>

In addition to historical recognition of Congress's broad power over immigration, there has also been a historical distinction between

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22. 345 U.S. 206 (1953).

23. LEGOMSKY, *supra* note 4, at 2.

24. *Id.*

25. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

26. *Id.* at 713-14.

27. *Landon v. Plasencia*, 459 U.S. 21, 35 (1982).

28. LEGOMSKY, *supra* note 4, at 26-52.

“exclusion” and “deportation.”<sup>29</sup> Exclusion typically refers to the act of denying admission at the border, and deportation means the act of expelling individuals from the interior. For purposes of this Comment, the terms exclusion or excludable will be used interchangeably with “inadmissible,” and the term deportable will apply to admissible aliens who are later ordered removed. In this context, the Supreme Court has stated that the historical treatment of excludable noncitizens has differed because “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”<sup>30</sup> However, “once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”<sup>31</sup> It follows that the distinction between a noncitizen who is excludable and a noncitizen who is deportable has been historically critical to determining what due process rights the noncitizen may have. Thus, the manner in which a noncitizen has entered the United States is critical in determining his constitutional rights.

#### A. *Detention Statutes*

In addition to distinctions between excludable and deportable noncitizens in case law, there have been instances of classification among the two classes of aliens in the Immigration and Nationality Act (“INA”).<sup>32</sup> However, since 1996, noncitizens of any class are simply subject to “removal” proceedings. During removal proceedings, 8 U.S.C. § 1226(c) provides that “the Attorney General shall take into custody any alien who” is removable because he has been convicted of one of a specified set of crimes.<sup>33</sup> If the removal proceedings determine that the noncitizen should be removed from the United States, the noncitizen is to be detained for ninety days, which gives the Immigration and Naturalization Service (“INS”) time to find a country that will accept the removable alien (the “removal period”).<sup>34</sup> Prior to *Zadvydas*, if the United States was unable to negotiate with another country to accept the removable noncitizen within ninety days, the Attorney General had discretionary authority to detain the noncitizen until his removal could be effected. If the Attorney General could not find a country to accept

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29. *Id.* at 26.

30. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

31. *Id.*; see LEGOMSKY, *supra* note 4, at 59.

32. 8 U.S.C. § 101 to 1775 (2000).

33. 8 U.S.C. § 1226(c) (2000).

34. 8 U.S.C. § 1231(a)(1)(A) (2000).

the noncitizen, the noncitizen would, in effect, be subject to indefinite detention. In such a situation, the alien was in a categorical black hole: he had no right to be in the United States because he had been adjudged removable, but no other country would accept him either.

*B. Excludable Noncitizens and Parole*

One final aspect of the INA that is important here is that an alien who is excludable may be paroled into the country temporarily under a variety of waivers, typically pursuant to refugee relief.<sup>35</sup> However, an alien's parole may be subsequently revoked, resulting in the detention of the alien by the INS prior to his deportation from the United States.<sup>36</sup> Thus, even though an excludable alien may have been granted temporary entry into the United States, he still holds the excludable tag, unless the Attorney General grants the noncitizen a status change.

III. *MEZEI, ZADVYDAS, CLARK, AND DEMORE: MUDDY WATER WITH RESPECT TO NONCITIZEN DETENTION*

*A. Shaughnessy v. United States ex rel. Mezei: The Seminal Case that Carved a Distinction Between an Admissible and an Inadmissible Alien's Constitutional Rights*

In *Shaughnessy v. United States ex rel. Mezei*,<sup>37</sup> the Supreme Court upheld the potentially indefinite detention of an excluded alien who the Government was unable to return anywhere else.<sup>38</sup> In that case, Mezei was an alien who had previously been admitted to the United States but was deemed inadmissible and excludable on Ellis Island upon return from an extended trip abroad. After a year and a half of unsuccessful attempts to secure a place to send Mezei, the State Department determined that no other country would take him. Mezei subsequently sued the Attorney General for violating his due process rights.<sup>39</sup> The Court stated that

[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process law. But an alien on the threshold of initial entry stands on a different footing:

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35. 8 U.S.C. § 1182 (2000).

36. 8 U.S.C. § 1226(b).

37. 345 U.S. 206 (1953).

38. *Id.* at 207-08, 211.

39. *Id.* at 207.

“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>40</sup>

The Court described a hard line distinction between excludable and deportable aliens: “To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process.”<sup>41</sup> The Court stated that because Mezei’s absence was much longer than temporary, he lost his admissible status, and accordingly, his proceeding was still an exclusion proceeding.<sup>42</sup> As such, Mezei was treated as if he was stopped at the border, as an excludable alien. Finally, the Court said that “we do not think that [Mezei’s] continued exclusion deprives him of any statutory or constitutional right.”<sup>43</sup>

The four dissenters to the decision in *Mezei* thought that Mezei deserved greater procedural protections because the Attorney General had refused to divulge any information as to why Mezei was being detained.<sup>44</sup> However, no Justice asserted that Mezei had a substantive constitutional right to release in the United States. In fact, Justice Jackson’s dissent asserted the opposite: “Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.”<sup>45</sup> In sum, the Court in *Mezei* held that with respect to a claimed legal right to release into the United States, an alien under final order of removal has the same right to entry as an excludable alien on the threshold of entry: the alien has no right. Fast forward over fifty years, and *Zadvydas* was the next case to address an issue similar to that addressed in *Mezei*.

*B. Zadvydas v. Davis: Reaffirming the Distinction Carved in Mezei Between an Admissible and Inadmissible Alien’s Constitutional Rights*

In *Zadvydas v. Davis*,<sup>46</sup> the Court considered a due process challenge to detention of aliens under 8 U.S.C. § 1231,<sup>47</sup> which governed alien detention following a final order of removal. Section 1231(a)(6) (“§ 1231”) provided, among other things, that when an alien who has

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40. *Id.* at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Ekiu v. United States*, 142 U.S. 651, 660 (1892)).

41. *Id.* at 213.

42. *Id.* at 214.

43. *Id.* at 215.

44. *Id.* at 217 (Black, J., dissenting).

45. *Id.* at 222-23 (Jackson, J., dissenting).

46. 533 U.S. 678 (2001).

47. 8 U.S.C. § 1231 (1994).

been ordered removed is not actually removed during the ninety-day statutory "removal period," that alien "may be detained beyond the removal period" in the discretion of the Attorney General.<sup>48</sup> The Court in *Zadvydas* read § 1231 to authorize continued detention of an alien following the ninety-day removal period for only such time as is reasonably necessary to secure the alien's removal.<sup>49</sup>

The Court in *Zadvydas* consolidated the cases of two legally admitted immigrants, Kestutis Zadvydas and Kim Ho Ma. Zadvydas was an admitted alien who had a long criminal history that included drug crimes, attempted robbery, attempted burglary, and theft. His most recent conviction was for possessing cocaine with intent to distribute, and he was sentenced to sixteen years imprisonment. In 1994, based on his numerous criminal convictions, Zadvydas was ordered removed to Germany, the country from which he had emigrated. After Zadvydas was ordered removed, the INS made repeated attempts to send Zadvydas to Germany, Lithuania, and the Dominican Republic. Ultimately, the INS could find no country willing to accept Zadvydas.<sup>50</sup>

After his removal order was issued in 1994, Zadvydas filed a writ of habeas corpus that challenged his continued detention. In October 1997, a federal district court granted that writ and ordered him released under supervision. However, the Fifth Circuit reversed this decision because Zadvydas's detention did not violate the Constitution due to continuing INS efforts to remove Zadvydas and because his detention was subject to periodic administrative review.<sup>51</sup>

The second consolidated case was that of Kim Ho Ma. Ma, like Zadvydas, was an admitted noncitizen who, at age seventeen, was involved in a gang-related shooting, convicted of manslaughter, and sentenced to thirty-eight months in prison. He served two years and was released into INS custody because Ma's conviction was an aggravated felony that made him subject to potential removal.<sup>52</sup>

Ma was subsequently ordered removed. The INS attempted to find a country that would accept Ma, but was unsuccessful. The ninety-day removal period expired in early 1999, but the INS continued to keep Ma in custody because of his former gang membership and the violent nature of his crime.<sup>53</sup> The INS was "unable to conclude that Mr. Ma would remain nonviolent and [that he would] not violate the conditions

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48. 8 U.S.C. § 1231(a)(6).

49. 533 U.S. at 699.

50. *Id.* at 683-85.

51. *Id.* at 685; *Zadvydas v. Underdown*, 185 F.3d 279 (1999).

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

53. *Id.*

of release.”<sup>54</sup> Ultimately, Ma was held in detention well beyond the ninety-day removal period window.<sup>55</sup>

In 1999, Ma filed a petition for a writ of habeas corpus, and a panel of five judges issued a joint order that held the Constitution forbids post-removal-detention unless there is a “realistic chance that [the] alien will be deported.”<sup>56</sup> The five judge panel ordered Ma released, and the Ninth Circuit affirmed.<sup>57</sup> In affirming, the Ninth Circuit read into the statute a “reasonable time” limitation beyond the ninety-day removal period.<sup>58</sup>

Zadvydas and Ma were in the highly unusual and regrettable situation of being a person with no home. Neither man was welcome in the United States due to being ordered removed, and no other country would accept them either. Of the basic competing interests, public safety versus a noncitizen’s right not to be detained indefinitely, which wins? The Court, primarily relying on statutory construction, concluded that indefinite detention of admissible aliens is prohibited.

**1. Congress’s Plenary Power.** The Government’s basic argument with respect to Congress’s power over immigration matters was that the subject matter at issue in *Zadvydas* was immigration and, as such, the Court’s role should be extremely limited.<sup>59</sup> The Government cited a century’s worth of precedent in support of Congress’s historically recognized “plenary power.”<sup>60</sup>

The Court expressed serious doubts about the Government’s argument. Justice Breyer, who wrote for the majority, stated that with respect to Congress’s plenary power, “that power is subject to important constitutional limitations.”<sup>61</sup> It is interesting that the Court cited *INS v. Chadha*<sup>62</sup> and *The Chinese Exclusion Case*<sup>63</sup> in support of its conclusion that Congress’s immigration power is subject to important constitutional limitations because both of those cases actually affirmed Congress’s plenary power.<sup>64</sup> Indeed, *The Chinese Exclusion Case* was

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54. *Id.* at 685-86.

55. *Id.*

56. *Id.* at 686 (citing *Binh Phan v. Reno*, 56 F. Supp. 2d 1149, 1156 (1999)).

57. *Kim Ho Ma v. Reno*, 208 F.3d 815 (2000).

58. *Id.* at 818.

59. *Zadvydas*, 533 U.S. at 692-96.

60. Brief for Respondents at 17, 20, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (No. 99-7791) 2001 WL 28667.

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

62. 462 U.S. 919 (1983).

63. 130 U.S. 581 (1889).

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

a foundational case that basically established the plenary power doctrine.<sup>65</sup> As will become clearer after the *Clark* discussion, the Court's statement that Congress's power over immigration matters is subject to important constitutional limitations may signal a shift away from Congress's historical plenary power over immigration matters. Unfortunately, this statement is the only meaningful discussion in *Zadvydas* related to Congress's plenary power, and the Court based the vast majority of its analysis on statutory construction principles.

**2. Statutory Construction.** In 1996 Congress added § 1231, which provided that the Attorney General was authorized, but not required, to detain a non-citizen subject to a final order of removal from the United States beyond the ninety-day removal period. The statute applied to three categories of aliens: (1) those ordered removed who were inadmissible under 8 U.S.C. § 1182<sup>66</sup> (applicable to excludable aliens); (2) aliens ordered removed who were removable by virtue of 8 U.S.C. § 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) (admissible aliens ordered removed generally because of criminal convictions); and (3) aliens ordered removed whom the Attorney General had determined to be a risk to the community or unlikely to comply with the order of removal.<sup>67</sup> In this case, the second category was at issue because *Zadvydas* and *Ma* were admissible aliens who were ordered removed because of criminal convictions.

The primary focus of the majority's opinion in *Zadvydas* was statutory construction. The Court stated that "it is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"<sup>68</sup> True, as with many areas of law, and especially in the ambit of immigration law, the Court here attempted to avoid a constitutional question. But was this really the best course of action? For future clarity, it would be much easier for lower courts and for Congress if the Court did not avoid the constitutional question, but addressed it squarely to provide Congress the most unambiguous foundation from which to craft a new statute. Nevertheless, the Court employed the constitutional avoidance canon in *Zadvydas*.

The Court also stated that "[w]e have read significant limitations into other immigration statutes in order to avoid their constitutional

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65. See 130 U.S. at 604.

66. 8 U.S.C. § 1182 (2000).

67. *Zadvydas*, 533 U.S. at 695; 8 U.S.C. §§ 1227(a)(1)(c), (a)(2), (a)(4) (2000).

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

invalidation.”<sup>69</sup> Yet, for support of this proposition, the Court cited only one case that construed a grant of authority to the Attorney General to ask aliens whatever questions he “‘deem[ed] fit and proper’ as limited to questions ‘reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue.’”<sup>70</sup> It is an overstatement to say that the Court has read significant limitations into other immigration statutes when only one case was cited and that case merely dealt with preventing INS agents from asking aliens absolutely ridiculous questions. Nevertheless, the Court declared that “[f]or similar reasons, we read an implicit limitation into [§ 1231].”<sup>71</sup> The Court went on to conclude: “In [the Court’s] view, [§ 1231], read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.”<sup>72</sup>

The Court added that a presumption will exist that an alien cannot be detained for more than six months after an order of removal, and after the six month period, if the alien demonstrates there is no significant likelihood of actual removal in the reasonably foreseeable future, the alien must be released.<sup>73</sup> At best, the Court was attempting to provide a temporary solution to the indefinite detention “problem” the Court faced under § 1231; at worst, this was simply legislating from the bench. Based on this holding, extremely dangerous noncitizens, just like Ma, have to be released after a six month period. This implicit reasonable time limitation makes an even stronger case for the Court not to employ the constitutional avoidance canon. By imposing a reasonable time measure, the Court creates its own interpretation that likely has little or nothing to do with actual congressional intent. Nevertheless, once the Court added its implicit reasonable time limitation to § 1231, the Court went on to discuss due process considerations.

**3. Due Process.** With its first sentence addressing the constitutionality of § 1231, the Court stated “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem.”<sup>74</sup> Specifically, the Court was concerned with § 1231’s interaction with the

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69. *Id.*

70. *Id.* (citing *United States v. Witkovich*, 353 U.S. 194, 195, 202 (1957)).

71. *Id.*

72. *Id.*

73. *Id.* at 701.

74. *Id.* at 690.

Fifth Amendment's Due Process Clause.<sup>75</sup> The Court stated that freedom from imprisonment and from other forms of physical restraint by the government "lies at the heart of the liberty" that the Due Process Clause protects.<sup>76</sup>

The Government's two stated goals of § 1231 included ensuring the appearance of noncitizens at future immigration proceedings and preventing danger to the community.<sup>77</sup> As to the first goal, ensuring appearance of noncitizens at immigration proceedings, the Court stated that preventing flight is a weak or nonexistent goal where removal seems a remote possibility.<sup>78</sup> In support of its conclusion, the Court cited *Jackson v. Indiana*,<sup>79</sup> a case that held where detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed.<sup>80</sup> In dissent, Justice Kennedy asked that if the only acceptable reason for detaining noncitizens pending removal is to secure their eventual removal, then why did the majority allow automatic detention even during the first ninety-days?<sup>81</sup> Despite Justice Kennedy's interesting point, the majority dismissed the Government's first goal of the statute because in *Zadvydas's* and *Ma's* situations, removal was a remote possibility.<sup>82</sup>

The Government's second justification, preventing danger to the community, was also dismissed by the Court. The Court stated that it has upheld preventive detention based on dangerousness only when limited to especially dangerous individuals and when the person was sheltered by strong procedural protections.<sup>83</sup> In addition, the Court stated that when preventive detention is of potentially indefinite duration, the Court has demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.<sup>84</sup>

The Government argued that the additional plus factor needed for indefinite detention based on dangerousness lied in the fact that the aliens at issue had been given final orders of removal and argued the aliens had no right whatsoever to be in the United States, much less be

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75. U.S. CONST. amend. V, cl. 3.

76. *Zadvydas*, 533 U.S. at 690.

77. *Id.*

78. *Id.*

79. 406 U.S. 715 (1972).

80. *Id.* at 738.

81. *Zadvydas*, 533 U.S. at 717 (Kennedy, J., dissenting).

82. *Id.* at 690.

83. *Id.* at 691.

84. *Id.*

out on the streets in public.<sup>85</sup> The Court never really responded to this argument. Rather, Justice Breyer stated only that the aliens' removable status bore no relation to the detainees' dangerousness.<sup>86</sup> Notably, the authority cited by the Court contained no requirement that the plus factor actually be related to the aliens' dangerousness.<sup>87</sup> In addition, the Government was not arguing that the aliens' removable status was necessarily related to the aliens' dangerousness. Rather, the Government was saying that Zadvydas and Ma had no right to be in the country because they had been adjudged removable, just the same as if they had been denied entry at the border. This fact supplied the plus factor, the special circumstance, in addition to dangerousness, that should have sufficed for indefinite detention.<sup>88</sup> Unfortunately, the Court did not directly answer whether the aliens' removable status supplied the additional plus factor in addition to dangerousness that could have outweighed the aliens' interest against indefinite detention.

With respect to procedural due process protections, the Court stated that the only protection for the alien here was found in administrative proceedings, in which the alien bore the burden of proving that he was not dangerous.<sup>89</sup> In criminal proceedings, an accused typically bears the burden of proving he is not dangerous when faced with a bond hearing, just as an alien does during removal proceedings. As such, the more significant concern of the Court was the lack of judicial review.<sup>90</sup> This proper and critical concern was justified because an alien subject to a removal hearing is typically tried by a lower level administrative immigration judge. However, Zadvydas and Ma were aliens who had already been adjudged removable, and they were not questioning the procedures that led to their being ordered removed.

Justice Scalia recognized this situation in his dissent, essentially arguing that Zadvydas and Ma had little to no due process rights at all.<sup>91</sup> Justice Scalia's argument was that because Zadvydas and Ma had been judged removable, they stood on the same ground as someone who had been deemed excludable at the border.<sup>92</sup>

In Justice Kennedy's dissent, he suggested that removable aliens could receive some type of additional procedural due process protection, such

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85. *Id.* at 692.

86. *Id.*

87. *Id.* at 692-93.

88. *Id.* at 691-94.

89. *Id.* at 691.

90. *Id.*

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

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

as an individual hearing that is subject to adequate judicial review, to determine dangerousness or flight risk.<sup>93</sup> Yet Justice Breyer rejected Justice Kennedy's suggestion that additional procedural protections could cure the indefinite detention problem by stating that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, *irrespective of the procedures used*, the Constitution permits detention that is indefinite and potentially permanent."<sup>94</sup> It is interesting to note that Justice Breyer made this statement after a lengthy discussion of *Mezei*, which held the exact opposite.

In addition, as will be pointed out in the discussion regarding *Clark*, *Zadvydas* and *Ma* had far greater opportunities to demonstrate that they were not dangerous or that they did not present a flight risk than do noncitizen detainees who are merely *awaiting* their removal hearing. Yet it is likely that a supposed lack of procedural protections greatly influenced Justice O'Connor's critical fifth vote in favor of striking down indefinite detention in this case. Curiously however, in *Clark*, Justice O'Connor voted with the majority to uphold mandatory detention of aliens who are awaiting their removal hearing.<sup>95</sup> This apparent inconsistency could have been cleared up by outlining what procedural due process requirements are due to aliens in order for any type of mandatory detention to pass constitutional muster. Yet the majority in *Zadvydas* gave terse treatment to the procedural process requirements necessary and then attempted to distinguish *Zadvydas* from *Mezei*.<sup>96</sup>

**4. *Mezei*.** In one of the lengthiest discussions in *Zadvydas*, Justice Breyer sought to distinguish *Zadvydas* from *Mezei*.<sup>97</sup> In *Mezei*, the Court refused to apply constitutional limits to the detention of a noncitizen denied admission.<sup>98</sup> Although *Mezei* was an LPR, he was considered a first time entrant because of a two year trip to Europe. When *Mezei* returned from Europe, he was detained on Ellis Island, and his presence there did not count as entry into the United States.<sup>99</sup> *Mezei* was treated as if he was excluded from entering the United States altogether, "as if stopped at the border."<sup>100</sup> This exclusion distinction according to the Court in *Zadvydas* "made all the difference."<sup>101</sup>

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93. *Id.* at 724-25 (Kennedy, J., dissenting).

94. *Id.* at 696 (emphasis added).

95. *See Clark*, 543 U.S. at 378.

96. *See* 533 U.S. at 692-95.

97. *Id.*

98. *See* 345 U.S. at 215-16.

99. *Id.* at 208.

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

101. *Id.*

The Court went on to state that the distinction “between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”<sup>102</sup> Yet this distinction has long been criticized as plainly illogical.<sup>103</sup> Indeed, Mezei’s situation demonstrated the excludable legal fiction that he had been stopped at the border because Mezei was on United States soil when he was detained. Mezei was at Ellis Island. Additionally, as will be explored in *Clark*, parolees who are temporarily allowed in the United States are most certainly well beyond the border and on United States soil. But parolees maintain their excludable status unless they obtain a status change from the Attorney General.

Nevertheless, the Court concluded that the excludable characteristic of *Mezei* distinguished *Zadvydas* because *Zadvydas* and *Ma* were not excludable aliens.<sup>104</sup> The Court specifically stated that “[a]liens who have not yet gained initial admission to this country would present a very different question.”<sup>105</sup> The Court went on to essentially reaffirm the excludable distinction the Court noted in *Mezei* in 1953, stating “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”<sup>106</sup> The Court also explained that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>107</sup> The Court also included a very interesting parenthetical from *Mezei*: “[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”<sup>108</sup> It is extremely difficult to give a realistically meaningful difference between an alien who has passed into the United States illegally and a parolee who has lawfully entered the United States temporarily. Indeed, it is even more difficult to believe an illegal alien possesses more due process rights than a parolee who has entered this country legally. Yet this passage quoted from *Mezei* indicated that the majority in *Zadvydas* gave support to this legal fiction.

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102. *Id.*

103. See LEGOMSKY, *supra* note 4, at 26-52.

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

105. *Id.* at 682.

106. *Id.* at 693 (citing *United States v. Verdugo-Urduidez*, 494 U.S. 259, 269 (1990)) (holding that the Fifth Amendment’s protections do not extend to aliens outside the territorial boundaries).

107. *Id.*

108. *Id.* at 693-94 (quoting *Mezei*, 345 U.S. at 212).

The Court in *Zadvydas* went on to state that, in *Mezei*, “both this Court’s rejection of Mezei’s challenge to the procedures by which he was deemed excludable and its rejection of his challenge to continued detention rested upon a basic territorial distinction.”<sup>109</sup> Clearly, this discussion suggested that the reasoning in *Mezei* was alive and well. Giving further credence to this theory is that the Court in *Clark* was presented with the perfect opportunity to overrule *Mezei*, but the Court chose not to mention the case at all.

Pundits critical of the excludable/admissible distinction in *Zadvydas* argue that the analysis used is almost as much a step back as a step forward because of the basic difficulty in squaring *Mezei* with the reality of noncitizens, such as parolees who are clearly on U.S. soil, but are constitutionally considered at the border.<sup>110</sup> It is easy to agree with this criticism because it would seem much more logical to maintain a consistent set of minimum procedural due process standards for all aliens, excludable or admissible. Additionally, as Justice Kennedy pointed out in his dissent, § 1231 makes no distinction between inadmissible and admissible aliens.<sup>111</sup> Thus, the majority’s apparent reaffirmation of the excludable/admissible distinction makes little sense when read in light of § 1231. Nevertheless, the Court in *Zadvydas* appeared to reaffirm the inadmissible/admissible distinction.

**5. The Terrorist Exception.** Another point of interest in *Zadvydas* is an apparent exception the Court carved out for terrorists.<sup>112</sup> Justice Breyer wrote that the cases before the Court did not require it to “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>113</sup> This statement is interesting on a number of levels. First, the Court decided *Zadvydas* before the terrorist attacks of September 11, 2001, leaving an open question as to how the Court would now treat a statute revised by Congress that broadly defines terrorism or other special circumstances. Second, Justice Kennedy pointed out in his dissent that the Court’s ruling makes it possible for aliens who have committed very serious crimes to be released immediately.<sup>114</sup> Justice Kennedy made reference to the cases

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109. *Id.* at 694.

110. LEGOMSKY, *supra* note 4, at 375.

111. *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting).

112. *Id.* at 696.

113. *Id.*

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

of a number of aliens who were released along with Ma<sup>115</sup> who committed crimes ranging from the rape and kidnapping of a thirteen-year-old girl to attempted, premeditated murder.<sup>116</sup> No doubt, the Court's ruling affirmed the Ninth Circuit's release of these aliens. It is baffling that the Court would carve out a potential exception for terrorism, while making no mention of the gravity of releasing incredibly dangerous aliens, who have no right to be in the United States, back into society.

The majority tried to belittle this fact by emphasizing that aliens released pursuant to the Court's ruling will be "supervised."<sup>117</sup> As is known by most laypersons and very astutely observed by Justice Kennedy, supervised release means very little because of the lack of INS resources to actually supervise aliens released pursuant to some type of supervision or parol.<sup>118</sup> Essentially, because the Court held that dangerousness alone was not enough for detaining a noncitizen, the Court had no choice but to gloss over the fact that incredibly violent aliens would be released back into society because of the Court's holding.

**6. Congressional Intent.** Finally, the Court made one final statutory construction argument in favor of prohibiting indefinite detention pursuant to § 1231. The Court stated that notwithstanding the "constitutional problem" presented by indefinite detention under § 1231, the Court reasoned that Congress did not express an intention to allow the indefinite detention of aliens awaiting removal.<sup>119</sup> The Court stated that if Congress had made clear its intent to permit indefinite detention, the Court would be required to give effect to that intent.<sup>120</sup> But, even after reviewing the statutory language as well as the history of the detention statutes, the Court was unable to find any congressional history, or other evidence, to demonstrate clear congressional intent to permit indefinite detention.<sup>121</sup> Although this line of statutory construction is certainly viable and applicable here, the Court's language does give additional support to the Court's historical recognition of Congress's plenary power over immigration matters. It appears that Congress could potentially revise § 1231 to make clear that Congress considered the possibility of indefinite detention and that Congress expressly approved (or disapproved the practice, if that is the

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115. Ma's case was consolidated by the Ninth Circuit with approximately one hundred other removed aliens.

116. *Zadvyas*, 533 U.S. at 715 (Kennedy, J., dissenting).

117. *Id.* at 700.

118. *Id.* at 717-18 (Kennedy, J., dissenting).

119. *Id.* at 696-97.

120. *Id.*

121. *Id.* at 697.

case) indefinite detention. Thus, this analysis of congressional intent leaves open and ambiguous whether congressional clarity in the statutory language would have saved indefinite detention under § 1231.

Ultimately, the Court concluded that indefinite detention under § 1231 was impermissible.<sup>122</sup> The Court based its conclusion primarily on statutory construction principles, and also searched for congressional intent, considered the Due Process Clause of the Fifth Amendment, and distinguished the *Mezei* decision. The most positive aspect of the Court's decision is that aliens who were being indefinitely detained absent sufficient procedural due process protections were released. Unfortunately, there are negative aspects of the Court's decision as well. First, what is left of the Court's historical deference to Congress, known as Congress's plenary power, within the ambit of immigration law? The Court stated that there were limits to Congress's plenary power, but did not elaborate as to what those limits were.

Second, the Court excepted terrorists and "other special circumstances" from its holding in *Zadvydas*.<sup>123</sup> This ruling leaves an opening for Congress to broadly define potentially indefinite detention of terrorists. In addition, it is unclear why terrorists should be specifically excepted from potentially indefinite detention, but violent and repeatedly convicted aliens should be released back into society despite being judged removable.

Third, the Court appeared to reaffirm *Mezei* and the distinction between excludable and admissible aliens. Affirming the excludable/-admissible alien distinction leads to illogical results, such as giving more procedural due process rights to an alien who enters the United States illegally than an alien who enters legally through temporary parole.

Finally, the Court appeared to have given Congress an opportunity to re-fortify its plenary power over immigration matters by stating that if Congress had expressed clear intent that it wanted to allow indefinite detention, the Court would have given effect to that intent despite the Court's constitutional concerns. The opening the Court left for Congress with this statement made the Court's constitutional concerns appear less powerful and simply provided Congress with a roadmap to craft a statute that may satisfy the Court despite potential constitutional concerns.

**7. After *Zadvydas*.** After the Court's ruling in *Zadvydas*, the Justice Department issued a new rule to comply with the Court's

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122. *Id.* at 701.

123. *Id.* at 696.

decision.<sup>124</sup> The rule established new procedures for INS determinations of whether a detainee's removal is likely in the reasonably foreseeable future. If removal is found likely, detention may continue, subject to review at least every six months. If removal is found unlikely, the rule generally requires release, but authorizes supervision.<sup>125</sup> Unfortunately, because the Court in *Zadvydas* did not require judicial review of the initial determination that the removable alien is dangerous or a flight risk, the new rule neither provides such protection to the alien nor provides individual determinations of dangerousness or flight risk.

In addition to actions taken by the Justice Department, after the decision in *Zadvydas*, a number of claims were filed by excludable aliens challenging their detention pursuant to § 1231. The courts of appeals that addressed the question were split, with a slight majority holding that *Zadvydas* did extend to excludable aliens. In general, the courts that held *Zadvydas* was applicable to excludable aliens followed the basic reasoning found in Justice Kennedy's dissent that, because § 1231 applied to admissible and excludable aliens in exactly the same manner, *Zadvydas* applied to excludable aliens on simply statutory construction grounds.<sup>126</sup> Courts that held *Zadvydas* did not extend to inadmissible aliens generally focused on the explicit language in *Zadvydas* that stated if the petitioners had been excludable aliens, an entirely different case would have been presented.<sup>127</sup> Thus, a circuit split arose based on whether *Zadvydas* applied to inadmissible aliens, and the Supreme Court decided the issue in *Clark* in early 2005.

### C. *Clark v. Martinez: Extending the Holding in Zadvydas to Excludable Aliens*

In *Clark v. Martinez*,<sup>128</sup> the Supreme Court considered whether the Court's prior holding in *Zadvydas* also applied to aliens deemed excludable, or inadmissible, to the United States.<sup>129</sup> *Zadvydas* established that, in applying § 1231, the INS must limit the time that it may detain aliens who have been found removable to that reasonably necessary to effect removal.<sup>130</sup> The Court concluded that the *Zadvydas*

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124. 8 C.F.R. § 241.13 (2001).

125. *Id.*; see LEGOMSKY, *supra* note 4, at 114.

126. See, e.g., *Rosales Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003).

127. See, e.g., *Correro v. Aljets*, 325 F.3d 1003 (8th Cir. 2002).

128. 543 U.S. 371 (2005).

129. *Id.* at 377-79.

130. *Zadvydas*, 533 U.S. at 702.

holding did extend to excludable aliens and that the reasonable period of time is presumptively six months.<sup>131</sup>

The Court in *Clark* consolidated the cases of two excludable aliens who had been ordered removed, Sergio Suarez Martinez and Daniel Benitez. In 1980, the Cuban government sent approximately 125,000 of its nationals to the United States by boat. The event was referred to as the Mariel boatlift because of their departure from the Mariel, Cuba port. Mr. Martinez and Mr. Benitez both arrived in the United States as part of the boatlift. Among the 125,000 nationals that arrived, many were hardened criminals who had simply been released from Cuba's prisons and sent to the United States. The United States government tried to identify which of the arriving Cubans were criminals and which were not, but had little success in actually identifying the criminals and even less success in procuring the identified criminals' return to Cuba. Because of the incredibly large number of Cubans that arrived at United States borders and the State Department's inability to negotiate their return to Cuba, the United States government paroled the Cubans, including Martinez and Benitez, into the country pursuant to 8 U.S.C. § 1182(d)(5).<sup>132</sup> Federal law permitted Cubans who were paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5) to adjust their status to LPR after one year. However, neither Martinez nor Benitez qualified for the adjustment because, by the time they applied for the adjustment, both men had become excludable because of prior criminal convictions in the United States. Both men's records included serious violent crimes.<sup>133</sup>

Martinez's parole was revoked in 2000. He was taken into custody by the INS, and removal proceedings were commenced against him. Martinez was found excludable by reason of his prior convictions and was ordered removed. Martinez was detained after expiration of the ninety-day removal detention period. The Court of Appeals for the Ninth Circuit ordered him released because it concluded that removal would not occur in the foreseeable future.<sup>134</sup>

Benitez's parole was revoked in 1993, and the INS detained him before he served his prison term and initiated removal proceedings against him. He was determined to be inadmissible by reason of his prior convictions, and an Immigration Judge ordered him removed. The INS detained Benitez, and he remained in custody after the ninety-day detention-removal period. In Benitez's case, the District Court for the Northern

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131. *Clark*, 543 U.S. at 386-87.

132. 8 U.S.C. § 1182(d)(5) (2004).

133. *Clark*, 543 U.S. at 374-75.

134. *Id.* at 375.

District of Florida also concluded that removal would not occur in the foreseeable future, but nonetheless denied the petition.<sup>135</sup> The Court of Appeals for the Eleventh Circuit affirmed, citing the Court's distinction between admissible and excludable aliens in *Zadvydas*.<sup>136</sup> The Supreme Court granted certiorari to resolve the circuit split and relied strictly on statutory construction grounds to extend the holding in *Zadvydas* to excludable aliens.

**1. Statutory Construction.** In *Clark*, the Court began by stating, just as it did in *Zadvydas*, that § 1231 applied to three categories of aliens: (1) aliens ordered removed who are inadmissible; (2) legally admitted aliens ordered removed who are removable under the three explicit criminal statutes; and (3) those ordered removed who the Attorney General (now Secretary of the Department of Homeland Security) determines to be either a risk to the community or a flight risk.<sup>137</sup> Section 1231 stated that if an alien in any of the above three categories was ordered removed, the Attorney General may detain the alien beyond the ninety-day detention-removal period.<sup>138</sup> The aliens here were in the first category of aliens covered by § 1231—aliens ordered removed who are inadmissible.

Justice Scalia, who wrote for the 7-2 majority despite penning a writhing dissent in *Zadvydas*, immediately began his opinion by citing the Court's decision in *Zadvydas*.<sup>139</sup> Justice Scalia stated that in *Zadvydas* the Court interpreted § 1231 to authorize the Attorney General to detain legally admitted aliens (the second category) only as long as was reasonably necessary to remove the alien from the country.<sup>140</sup> Scalia emphasized that because the statute used the word "may," § 1231 was found ambiguous as to whether it permitted the Attorney General to detain an alien indefinitely.<sup>141</sup> Accordingly, the Court imposed a six month presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal.<sup>142</sup> After six months, "the alien is eligible for conditional release if he can demonstrate that there is 'no significant likelihood of removal in the reasonably foreseeable future.'"<sup>143</sup> Justice Scalia then concluded

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135. *Id.*

136. *Id.* at 376.

137. *Id.*

138. *Id.*

139. *See id.* at 377.

140. *Id.*

141. *Id.*

142. *Id.* at 378.

143. *Id.* (quoting *Zadvydas*, 533 U.S. at 701).

that, because the operative language of § 1231 (“may be detained beyond the removal period”) applied without differentiation to all three categories of aliens that are its subject, the six month presumptive period must apply to removable inadmissible aliens (the first category) just the same as it applied to removable admitted aliens (the second category).<sup>144</sup> Thus, the precise hypothetical situation that Justice Kennedy predicted in his dissent in *Zadvydas* came to fruition in *Clark*: that it is not plausible for inadmissible and admissible aliens to be treated differently by the language of § 1231.

Justice Scalia went on to address the obvious argument that the dissent raised against extending the holding in *Zadvydas* to apply to inadmissible aliens: the majority’s own statement in *Zadvydas* that “[a]liens who have not yet gained initial admission to this country would present a very different question.”<sup>145</sup> Justice Scalia responded to the dissent’s argument with the statement that “[t]his mistakes the reservation of a question with its answer.”<sup>146</sup> Maybe Justice Scalia actually saw how the exact words written by the majority in *Zadvydas*, which he vehemently opposed, mistook the reservation of a question with its answer. But unfortunately, Justice Scalia’s answer here is incredibly deficient. Undoubtedly, Justice Scalia had no choice but to join the majority opinion because the plain language of § 1231 applied to all three categories of aliens equally. However, his response could have at least acknowledged the obvious: the majority opinion in *Zadvydas* clearly distinguished admissible aliens from inadmissible aliens, and the Court in *Zadvydas* used that single distinction to avoid the incredibly strong precedent of *Mezei*. Justice Scalia simply stated that the Court in *Zadvydas* “refused to decide” the question of whether the six month reasonable time presumption applied equally to inadmissible aliens, and that “we answer” that question today.<sup>147</sup>

The Court in *Clark* went on to explain that the opinion in *Zadvydas* relied on ambiguities in the statutory text and statutory construction canon—that statutes should be interpreted to avoid constitutional doubts—to prohibit indefinite detention of the second category of removable aliens pursuant to § 1231.<sup>148</sup> With respect to § 1231’s application to admissible versus inadmissible aliens, the Court stated that it “cannot justify giving the *same* detention provision a different

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144. *Id.*

145. *Id.* (quoting *Zadvydas*, 533 U.S. at 682).

146. *Id.*

147. *Id.* at 379.

148. *Id.*

meaning when [inadmissible] aliens are involved.”<sup>149</sup> The Court also introduced the statutory construction concept of “the lowest common denominator,”<sup>150</sup> which the dissent found much joy in attacking.<sup>151</sup> This concept, the Court wrote, dictates that “when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.”<sup>152</sup> Justice Scalia devoted a considerable amount of time to explaining this canon of the lowest common denominator, despite the fact that it is simply the constitutional avoidance canon with a new name. Undoubtedly, the Court in *Clark* was faced with a clear inconsistency from *Zadvydas*, and Justice Scalia felt the need to add some puffery to his opinion. However, it is perfectly clear that basic principles of statutory construction demanded the result reached in *Clark*.

The remainder of Justice Scalia’s opinion sought to address the dissent’s feeble attempts at using statutory construction principles to seek a different result and need not be addressed here. However, Justice Scalia did provide a very interesting paragraph:

The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it. But for this Court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.<sup>153</sup>

This clear statement to Congress brings back the debate of Congress’s plenary power over immigration because it is very clear that Justice Scalia believes Congress can rectify the result reached by the Court if Congress chooses to draft a statute that treats inadmissible aliens different from admissible aliens. In addition, because the Court based its decision entirely on statutory construction principles and made no mention whatsoever of *Mezei*, the constitutionality of indefinite detention of inadmissible aliens is still very unclear. Most likely, the indefinite detention of inadmissible aliens would likely pass constitutional muster

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149. *Id.* at 380.

150. *Id.*

151. *Id.* at 393 (Thomas, J., dissenting).

152. *Id.* at 380-81.

153. *Id.* at 386.

because of the complete lack of constitutional principles discussed in *Clark*, but this is certainly unclear at best.

Finally, the Court made one last pseudo-instruction to Congress and the INS. The Court stated that because the “Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an inadmissible alien, the [six]-month presumptive detention period we prescribed in *Zadvydas* applies.”<sup>154</sup> Thus, if Congress or the INS wants to obtain more time to effect removal, all that appears to be required is a decent justification.

As part of her concurrence, Justice O’Connor wrote separately to discuss the means by which the government can still detain inadmissible aliens for longer than the presumptive six month reasonable time period.<sup>155</sup> Justice O’Connor pointed out that, if the Government shows that it takes longer to remove an inadmissible alien than an admissible alien, the detention beyond the six month presumptive detention period will be lawful pursuant to the Court’s interpretation of § 1231 in *Zadvydas*.<sup>156</sup> Justice O’Connor also noted that the Secretary of Homeland Security may detain an alien for successive six month periods if the Secretary certifies that the alien’s release will threaten national security because the alien has engaged in certain terrorist or other dangerous activity.<sup>157</sup> Finally, Justice O’Connor reiterated that any alien released pursuant to the rulings in *Clark* and *Zadvydas* still remains subject to the conditions of supervised release.<sup>158</sup> Justice O’Connor’s short concurrence speaks for itself in relaying her concerns regarding releasing potentially dangerous aliens back into the community. However, *Mezei* still hangs in the balance and, accordingly, the dissent focused heavily on the majority’s failure to even cite *Mezei* anywhere in its opinion.

The dissent, authored by Justice Thomas, immediately pointed out that in *Zadvydas* the Court stated that “[a]liens who have not yet gained initial admission to this country would present a very different question.”<sup>159</sup> The dissent continued by noting that “this constitutional distinction—which ‘made all the difference’ to the *Zadvydas* court . . . is actually irrelevant, because [t]he operative language of [§ 1231(a)(6)] . . . applies without differentiation to all three categories of aliens that are

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154. *Id.*

155. *Id.* at 387 (O’Connor, J., concurring).

156. *Id.* (O’Connor, J., concurring).

157. *Id.* (O’Connor, J., concurring).

158. *Id.* (O’Connor, J., concurring).

159. *Id.* at 388 (Thomas, J., dissenting) (citing *Zadvydas*, 533 U.S. at 682).

its subject.<sup>160</sup> Justice Thomas summed up the thrust of his lengthy dissent by congratulating the Court for their adherence to statutory construction principles, but stated that “the Court’s analysis cannot be squared with *Zadvydas*.”<sup>161</sup> Justice Thomas went on to emphasize that even if the Court’s decision in *Clark* could be synthesized with *Zadvydas*, he still believed *Zadvydas* was wrongly decided and should be overruled.<sup>162</sup>

Despite the unquestionable inconsistency in *Zadvydas* regarding express statements that distinguished inadmissible aliens from admissible aliens, statutory construction principles surely demanded the result reached by the Court in *Clark*. But the combination of *Zadvydas* and *Clark* leaves two unanswered questions. First, is there still a meaningful inadmissible/admissible alien distinction? Second, because *Mezei* so clearly distinguished the constitutionality of indefinite detention for an inadmissible alien from an admissible alien, is *Mezei* still good law? *Mezei* is probably still good law because of the Court’s reliance upon statutory construction principles alone and the Court’s call for action from Congress regarding inadmissible aliens if it so desired. Ultimately, by extending the *Zadvydas* proscription of indefinite detention pursuant to § 1231 on statutory construction principles alone, the Court avoided the constitutional question altogether and put the onus on Congress to determine whether it wants to continue to employ a meaningful distinction between admissible and inadmissible aliens. By doing so, the Court properly avoided a power struggle over immigration law, but also avoided both the plenary power debate and prescribing what constitutional due process rights an inadmissible alien has, if any. As of this writing, Congress has not amended § 1231 to distinguish between admissible and inadmissible aliens.

*D. Demore v. Hyung Joon Kim: Mandatory Detention of Noncitizens Who Are Awaiting Their Removal Hearing*

The Court in *Zadvydas* grappled with the question of indefinite detention of admitted, removable noncitizens.<sup>163</sup> The Court in *Clark* extended the holding of *Zadvydas* to apply to inadmissible, removable noncitizens.<sup>164</sup> The courts have also struggled with the constitutionality of *mandatory* detention. Until 1988, immigration law gave the Attorney General the discretion to detain a noncitizen pending removal

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160. *Id.* (Thomas, J., dissenting).

161. *Id.* (Thomas, J., dissenting).

162. *Id.* (Thomas, J., dissenting).

163. *See* 533 U.S. 678.

164. *See* 543 U.S. 371.

proceedings or to release the person on bond or on his own recognizance.<sup>165</sup> The noncitizen would normally be released pending the hearing unless, after an individualized inquiry, it was determined that the person was likely either to abscond or to endanger the public.<sup>166</sup> However, an exception was carved out of the Attorney General's discretion that specifically required detention, pending what were called deportation proceedings (now called removal proceedings), of any noncitizen who had been convicted of an "aggravated felony".<sup>167</sup> Subsequent amendments extended the reach of mandatory detention to a wide range of other categories, mostly related to multiple criminal convictions or high level felonies.<sup>168</sup>

Many noncitizens who had finished serving their criminal sentences, but who were detained pending their deportation or removal proceedings, challenged these detention provisions on constitutional grounds. The most common argument was that, before a person may be detained for the often lengthy period that removal proceedings take, due process requires an individualized evaluation of whether the person is likely to abscond or to endanger the public; a proxy for dangerousness or absconding based on prior criminal convictions is not sufficient. Although prior to *Zadvydas* the lower courts divided, a majority of lower courts agreed that mandatory, categorical detention under such circumstances violated due process.<sup>169</sup> These lower courts held that an individualized hearing was required, just like an indicted citizen receives during a criminal bond hearing.<sup>170</sup>

After *Zadvydas* was decided, opponents of mandatory detention pending removal without an individualized hearing became much more optimistic. Then the terrorist attacks of September 11, 2001, occurred and the mandatory detention issue was decided in a much different atmosphere than was *Zadvydas*.

In *Demore v. Hyung Joon Kim*,<sup>171</sup> the Court addressed 8 U.S.C. § 1226(c),<sup>172</sup> ("§ 1226") which provided that "the Attorney General shall take into custody any alien who" is removable from this country because he has been convicted of one of a specified set of crimes.<sup>173</sup> Pursuant

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165. LEGOMSKY, *supra* note 4, at 20.

166. *Id.*

167. *Id.*; 21 U.S.C. § 1501 (1988).

168. LEGOMSKY, *supra* note 4, at 20; 8 U.S.C. § 235 (2000).

169. LEGOMSKY, *supra* note 4, at 20.

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

171. 538 U.S. 510 (2003).

172. 8 U.S.C. § 1226(c) (2003).

173. *Id.*

to § 1226, the INS detained Mr. Kim and he brought suit seeking his release.<sup>174</sup>

In 1986, Mr. Kim, a citizen of the Republic of South Korea, became an LPR of the United States. In 1996, Mr. Kim was convicted of first-degree burglary in California, and in 1997 he was convicted of a second crime, petty theft with priors. The INS charged Mr. Kim with being deportable (now called removable) in light of these convictions and detained him pending his removal hearing.<sup>175</sup>

The majority stated, which was disputed by the dissent, that Mr. Kim forwent a hearing at which he would have been entitled to dispute that he fit within one of the long list of grounds for removal from the United States.<sup>176</sup> Instead, he filed a habeas corpus action in the United States District Court for the Northern District of California challenging the constitutionality of his mandatory detention. The district court agreed with Mr. Kim that the mandatory detention to which he was subjected pursuant to § 1226 was unconstitutional, and the INS released Mr. Kim pursuant to the district court's ruling.<sup>177</sup> The Court of Appeals for the Ninth Circuit affirmed and concluded that the INS had not provided a justification "for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest."<sup>178</sup>

Three other courts of appeals reached the same conclusion,<sup>179</sup> but the Seventh Circuit rejected a constitutional challenge to § 1226 by a permanent resident alien.<sup>180</sup> The Supreme Court granted certiorari to Mr. Kim to resolve the circuit split, but unfortunately for Mr. Kim, the Court held that the mandatory detention prescribed by § 1226 was justified.<sup>181</sup> The Court first discussed whether it possessed jurisdiction to hear the case in light of 8 U.S.C. § 1226(e) ("§ 1226(e)") pertaining to judicial review, which provides:

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien of the grant, revocation, or denial of bond or parole.<sup>182</sup>

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174. *Demore*, 538 U.S. at 513.

175. *Id.*

176. *Id.* at 514.

177. *Id.* at 514-15.

178. *Id.* at 515 (quoting *Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002)).

179. *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002).

180. *Parra v. Perryman*, 172 F.3d 943 (7th Cir. 1999).

181. *Demore*, 538 U.S. at 513.

182. *Id.* at 516 (quoting 8 U.S.C. § 1226(e) (2003)).

The Court read both sentences together in determining that, because § 1226 was a mandatory, not discretionary judgment, § 1226(e) did not preclude judicial review of this case.<sup>183</sup> In concurrence, Justice O'Connor disagreed and focused on the second sentence of § 1226(e) in concluding that the Court did not have jurisdiction to review this case.<sup>184</sup> Having determined that the federal courts have jurisdiction to review a constitutional challenge to § 1226, the Court upheld the mandatory detention under § 1226.<sup>185</sup> The Court relied upon the stated purpose of § 1226, which is to prevent flight and protect the public, and appeared to further reaffirm Congress's plenary power over immigration matters.<sup>186</sup> The Court also distinguished *Zadvydas*.<sup>187</sup>

**1. Purposes of § 1226: Prevent Flight During the Pendency of the Removal Hearing and to Protect the Public.** The two principal justifications for mandatory detention under § 1226 according to the Government were: (1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens.<sup>188</sup> In addition to the stated purposes of § 1226, the Court cited numerous statistics in support of the goals of § 1226.<sup>189</sup> The Court stated that criminal aliens were the fastest growing segment of the federal prison population to support the goal of protecting the public from dangerous criminal aliens.<sup>190</sup> Also, the Court cited statistics that tended to show that more than twenty percent of deportable criminal aliens failed to appear for their removal hearings supporting § 1226's goal of ensuring the presence of criminal aliens at their removal proceedings.<sup>191</sup> Interestingly, by citing these statistics, it certainly appeared that the Court accepted Congress's use of a statistical proxy, instead of an individual assessment, in determining dangerousness or absconsion, which was expressly disallowed in *Zadvydas*. Nevertheless, the Court appeared to have accepted the Government's purposes behind

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183. *Id.* at 516-17.

184. *Id.* at 533-36 (O'Connor, J., concurring). Justice O'Connor's concurrence is mentioned here only because of its potential significance in demonstrating her belief that the Court should completely defer to the Attorney General in this situation, notwithstanding any other considerations, constitutional or otherwise.

185. *Id.* at 517.

186. *Id.*

187. *Id.* at 527-29.

188. *Id.* at 518.

189. *Id.*

190. *Id.*

191. *Id.*

§ 1226 and went on to discuss the Court's historical deference to Congress over immigration matters.<sup>192</sup>

**2. Congressional Power Over Immigration Matters.** The Court began its discussion of Congress's power over immigration matters by stating, "[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>193</sup> The Court cited a number of cases in support of this proposition, which interestingly included Justice Kennedy's dissent in *Zadvydas*.<sup>194</sup> This inclusion suggested that the Court may be shifting towards the reasoning espoused by the dissent in *Zadvydas* and towards reaffirming the historical recognition of Congress's historical plenary power over immigration matters.<sup>195</sup> With this precedential setting established, the Court went on to address the real issue in the case, the Fifth Amendment.<sup>196</sup>

**3. The Fifth Amendment.** The real issue in *Demore*, the Court proclaimed, was whether the INS may detain Mr. Kim during the period of time during which his removal hearing was pending, in light of the Due Process Clause of the Fifth Amendment.<sup>197</sup> In a footnote to this discussion, the Court noted that Mr. Kim's "concession" in his habeas petition that he was deportable was important because it established that, by his own choice, he did not receive one of the procedural protections available to him during the removal process.<sup>198</sup> It is important to note that in a typical removal proceeding, the Government must prove that the noncitizen is deportable based on the noncitizen's fitting within one of the long list of grounds for removal. Importantly, the noncitizen does not receive a hearing devoted to determining whether the noncitizen is dangerous or actually poses a flight risk. In that respect, the procedure involved in § 1226 differs from the procedural process involved in § 1231 because a noncitizen under § 1231 did receive a hearing devoted to determining the noncitizen's dangerousness or flight risk. In short, despite the majority and dissent devoting considerable time to the question of whether Mr. Kim conceded deportability, the permissibility of mandatory detention should not have any relation to whether the alien is actually deportable. That determination is

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192. *Id.* at 520-23.

193. *Id.* at 521 (citing *Mathews v. Diaz*, 425 U.S. 67, 79-80 (1976)).

194. *See* 533 U.S. at 705-25.

195. *Demore*, 538 U.S. at 522.

196. *Id.* at 523-26.

197. *Id.* at 523.

198. *Id.* at 523 n.6.

unrelated to § 1226's requirement of mandatory detention. It is unrelated because § 1226's goals are to ensure the noncitizen's appearance at the removal hearing and to protect the community from the noncitizen, not to procure the noncitizen's removal. Nevertheless, despite the majority's and dissent's considerable disagreement as to whether Mr. Kim conceded deportability, the Court ultimately addressed Mr. Kim's due process argument.<sup>199</sup>

The Court noted “[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”<sup>200</sup> The Court also stated that “[a]s we said more than a century ago, deportation proceedings ‘would be vain if those accused could not be held in custody pending the inquiry into their true character.’”<sup>201</sup> Interestingly, the Court cited the *Zadvydas* majority opinion that distinguished constitutionally questioned indefinite detention under § 1231 from “detention pending a determination of removability,”<sup>202</sup> and again to Justice Kennedy's dissent in *Zadvydas* where he stated, “Congress's power to detain aliens in connection with removal or exclusion . . . is part of the Legislature's considerable authority over immigration matters.”<sup>203</sup> The Court also noted that prior to 1907, there was no provision permitting bail for any class of aliens during the pendency of their deportation proceedings.<sup>204</sup> Apparently, all of this reasoning, taken together, distinguished mandatory detention pursuant to § 1226 from discretionary detention pursuant to § 1231 in *Zadvydas*.

The Court then went into a detailed description of two cases: *Carlson v. Landon*<sup>205</sup> and *Reno v. Flores*<sup>206</sup> to further support § 1226's mandatory detention. In *Carlson*, the Court stated that the aliens, who were communists, challenged their detention on the grounds that there had been no finding that they were unlikely to appear for their deportation proceedings when ordered to do so.<sup>207</sup> Their challenge was on the same grounds as Mr. Kim's. In *Carlson*, the Court rejected the aliens' claims that they were entitled to be released from detention if they did not pose a flight risk because “detention is necessarily a part of this deportation procedure.”<sup>208</sup>

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199. *Id.* at 526-30.

200. *Id.* at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

201. *Id.* (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

202. *Id.* (citing *Zadvydas*, 533 U.S. at 697).

203. *Id.* (quoting *Zadvydas*, 533 U.S. at 711 (Kennedy, J., dissenting)).

204. *Id.* at 523 n.7.

205. 342 U.S. 524 (1952).

206. 507 U.S. 292 (1993).

207. 342 U.S. at 530-32.

208. *Demore*, 538 U.S. at 524 (quoting *Carlson*, 342 U.S. at 538).

The Court also responded to the dissent's charge that the aliens in *Carlson* received individualized determinations of dangerousness by saying that the dissent was mistaken because the aliens in *Carlson* had not been determined individually dangerous.<sup>209</sup> However, two sentences later, the Court stated that "in at least one case, there was a specific finding of *nondangerousness*."<sup>210</sup> While it may be technically correct to say that an alien had not been found individually dangerous because he was found nondangerous, it seems to misconstrue the fact that the alien actually received an individual determination of dangerousness, despite the fact that the determination was negative. Ultimately, the Court in *Carlson* held that the denial of bail to the aliens was permissible "by reference to the legislative scheme to eradicate the evils of Communist activity."<sup>211</sup>

In *Reno* the Court stated that the case concerned another due process challenge to detention during deportation proceedings.<sup>212</sup> In that case, the aliens challenged the INS's policy of releasing detained alien juveniles only into the care of their parents, legal guardians, or certain other adult relatives.<sup>213</sup> The Court in *Demore* stated that the aliens in *Reno* argued that the policy improperly relied "upon a 'blanket' presumption of the unsuitability of custodians other than parents, close relatives, and guardians" to care for the detained juvenile aliens.<sup>214</sup> If no suitable custodian was found, the aliens remained in INS custody.<sup>215</sup> But, the Court stated that the aliens' due process challenge in *Reno* was "rejected" and that the Court there "upheld the constitutionality of the detention."<sup>216</sup> However, in a parenthetical to *Reno*, the Court stated that "[i]n the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation . . . . [T]he particularization and individuation need go no further than this."<sup>217</sup> By quoting this language from *Reno*, it is unclear why the Court even cited *Reno* because, in that case, the aliens did receive individualized determinations as to whether they could be released into the custody of an appropriate relative. An individualized determination of dangerousness or flight risk is exactly what Mr. Kim was seeking in this case. Yet, the

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209. *Id.* at 524-25.

210. *Id.* at 525 (emphasis added).

211. *Id.* (quoting *Carlson*, 342 U.S. at 543).

212. 507 U.S. at 297.

213. *Id.*

214. 538 U.S. at 526 (quoting *Reno*, 507 U.S. at 297).

215. *Id.*

216. *Id.*

217. *Id.* (quoting *Reno*, 507 U.S. at 313-14).

Court cited *Reno* in support of its conclusion that the Due Process Clause does not demand an individualized determination of dangerousness pursuant to the mandatory detention under § 1226 and proceeded to attempt to distinguish *Zadvydas*.<sup>218</sup>

**4. Distinguishing *Zadvydas*.** In transitioning to its discussion of *Zadvydas*, the Court in *Demore* stated that the four courts of appeals that held § 1226 to be unconstitutional relied heavily on *Zadvydas*.<sup>219</sup> The Court described its holding in *Zadvydas* by stating the “Court in *Zadvydas* read § 1231 to authorize continued detention of an alien following the [ninety]-day removal period for only such time as is reasonably necessary to secure the alien’s removal.”<sup>220</sup> But, the Court explained, “*Zadvydas* is materially different from the present case in two respects.”<sup>221</sup> First, the Court stated the aliens in *Zadvydas* were challenging their detention following a removal order when removal was “no longer practically attainable.”<sup>222</sup> Because their removal was no longer practically attainable in *Zadvydas*, the Court opined that detention no longer bore a reasonable relation to the purpose for which the individual was committed.<sup>223</sup> While it is certainly accurate that the Court in *Zadvydas* based its holding on the fact that the actual removal of aliens was not likely, the Court in *Zadvydas* also rejected the other purposes of § 1231’s detention of aliens.<sup>224</sup> Those purposes were exactly the same as the purposes of § 1226: preventing criminal aliens from fleeing prior to or during their removal proceedings and protecting the community. However, in *Demore*, the majority, composed of the four dissenters from *Zadvydas* and Justice O’Connor, who voted with the majority in *Zadvydas*, accepted mandatory detention under § 1226 because its goal of procuring an alien’s attendance at his removal hearing was most certainly attainable.<sup>225</sup> The Court went on to state that “when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.”<sup>226</sup>

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218. *See id.* at 526-27.

219. *Id.* at 527 (referring to *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002); *Patel v. Zenski*, 275 F.3d 299 (3rd Cir. 2001); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002)).

220. *Id.*

221. *Id.*

222. *Id.* (quoting *Reno*, 507 U.S. at 313-14).

223. *Id.*

224. *See* 533 U.S. at 690.

225. *Demore*, 538 U.S. at 528.

226. *Id.*

The second distinguishing feature of *Zadvydas*, the Court explained, was that the period of detention at issue in *Zadvydas* was indefinite and potentially permanent, whereas the pertinent detention in *Demore* was “of much shorter duration.”<sup>227</sup> In support of this position, the Court stated that the Court in *Zadvydas* distinguished § 1231 from § 1226 with the express statement that “post-removal-period detention, *unlike detention pending a determination of removability . . .*, has no obvious termination point.”<sup>228</sup> To further support distinguishing *Zadvydas* from *Demore*, the Court cited INS statistics that demonstrated in the majority of cases, mandatory detention under § 1226 lasts for less than the ninety-days, which the Court in *Zadvydas* considered valid.<sup>229</sup> The Court summarized that the detention pursuant to § 1226 lasts roughly a month and a half in the vast majority of cases and about five months in the minority of cases in which the alien chooses to appeal.<sup>230</sup> However, cases cited by the dissent in *Demore* demonstrated that some noncitizens detained pursuant to § 1226 were detained much longer than the six month reasonable time period prescribed in *Zadvydas*.<sup>231</sup> Nevertheless, the Court distinguished *Zadvydas* and approved mandatory detention under § 1226.

#### IV. THE INTERPLAY AND PROGENY OF *ZADVYDAS*, *CLARK*, AND *DEMORE*

So, where are we now? The decisions reached by the Court in *Mezei*, *Zadvydas*, *Clark*, and *Demore* were complementary in some respects and plainly contradictory in others. The controversial due process rights distinction between admissible and inadmissible aliens the Court carved in *Mezei* was seemingly reinforced in *Zadvydas*, only to be potentially rolled back in *Clark*. What is the status of the distinction now? The Court’s long deference to Congress over immigration matters was subjected to “important constitutional limitations” in one portion of the *Zadvydas* opinion, and later in the very same case, the Court stated that it would have deferred to Congress regarding indefinite detention had Congress made its intent clear.<sup>232</sup> What of Congress’s plenary power? In *Zadvydas*, the Breyer majority avoided specifically addressing what procedural due process rights a noncitizen possessed, only to have the Rehnquist majority roll back a noncitizen’s procedural rights even

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227. *Id.*

228. *Id.* at 529 (quoting *Zadvydas*, 533 U.S. at 697).

229. *Id.*

230. *Id.*

231. *Id.* at 566-68 (Sauter, J., dissenting).

232. *See* 533 U.S. 678.

further in *Demore*. What about noncitizen procedural due process rights now? Finally, in *Zadvydas*, the Breyer majority refused to accept the Government's justifications of preventing flight and protecting the public as reasons for discretionary authority,<sup>233</sup> only to have the Rehnquist majority accept those very same justifications for mandatory detention in *Demore*.<sup>234</sup> So, what about accepting a proxy such as criminal convictions for dangerousness or flight risk? Can these inconsistencies simply be explained by recognizing that *Zadvydas* was decided before the terrorist attacks of September 11, 2001, and *Clark* and *Demore* were decided afterwards? Maybe. These main points will each be addressed in turn below.

A. *The Procedural Due Process Distinction Between Admissible and Inadmissible Aliens*

So, what is left of the admissible and inadmissible alien distinction that grants more due process rights to admissible aliens than to inadmissible aliens? Beginning over fifty years ago, the Court in *Mezei* carved a distinction between admissible and inadmissible aliens. This distinction was apparently ratified by the Court in *Zadvydas*, which stated that the distinction "between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."<sup>235</sup> But, the Court in *Clark* held that the reasonable time limitation it applied to discretionary detention in *Zadvydas* also applied equally to inadmissible aliens, despite the Court stating in *Zadvydas* that if that case had concerned an alien who had not yet gained initial admission into the United States, it would have presented a "very different question."<sup>236</sup> Notwithstanding the Court's obvious inconsistency in applying the admissible and inadmissible alien distinction, the real question to ask here is does this distinction make sense?

The phrase that the Court in *Zadvydas* quoted from *Mezei* that "[a]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"<sup>237</sup> sounds promising with respect to procedural due process rights. But does it really make sense? No, it does not. For example, take the case of one of the Mariel Cubans. When he reached our border, he was most likely temporarily paroled into

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233. *See id.* at 687-705.

234. *See* 538 U.S. at 524-30.

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

236. *Id.* at 682.

237. *Id.* at 693-94.

this country and was essentially free to go wherever he pleased – one hundred percent legally. However, before the U.S. State Department decided to grant LPR status to those Mariel Cubans, those who were legally on temporary parole still maintained their inadmissible status and could have been ordered removed at any time, with little to no due process rights.

Yet, contrast the plight of a Mariel Cuban who has followed every legal step in obtaining temporary parolee status with that of an illegal alien who sneaks across the border. According to the passage above from *Mezei* that the Court in *Zadvydas* quoted, the illegal alien has far greater procedural due process rights than the legally admitted temporary parolee. Why? There truly is no good answer for this distinction, especially because both aliens are physically on U.S. soil. The legal fiction that the temporary parolee is stopped at the border is ridiculous. The Court in *Clark* was presented with a perfect opportunity to eliminate the distinction between the due process rights of admissible and inadmissible aliens, but unfortunately chose to base its reasoning on statutory construction principles, while making no mention of due process rights. Thus, even though the Court in *Clark* applied the reasonable time limitation to detention under § 1231 equally to admissible and inadmissible aliens, based purely on statutory construction principles, it would appear that the procedural due process distinction between admissible and inadmissible aliens would still be upheld should Congress choose to revive it and make its intent clear.

*B. Congress's Plenary Power Over Immigration Matters and the Court's Avoidance of Establishing Procedural Due Process Protections for Noncitizens*

Over one hundred years ago, the Court established Congress's broad discretion over immigration matters in *Ting v. United States*.<sup>238</sup> Fifty years later, the Court reaffirmed Congress's plenary power in *Mezei*. In *Zadvydas*, the Court stated that Congress's power over immigration matters was subject to important constitution limitations. However, in the very same case, the Court held that if Congress had made its intention clear that it wanted to allow indefinite detention of aliens who had been ordered removed, the Court would have given effect to Congress's intention. Then, in *Demore*, the Court stated that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to

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238. 149 U.S. 698 (1893).

citizens.”<sup>239</sup> So, the Court went from adopting the view that Congress’s power over immigration matters is very broad, to stating that its power is subject to certain limitations, to deferring to Congress only when Congress’s intent is clear, to deferring to Congress when it makes rules relating to immigration matters that would be unacceptable if applied to citizens.

Should the Court defer to Congress in such a way? The basic argument supporting Congress’s plenary power over immigration matters is that immigration matters interweave with foreign policy so heavily that the Court should remain out of immigration matters altogether. While this rationale is certainly a viable and even accurate argument to some extent, the Court should, at a minimum, directly address what procedural due process protections noncitizens should receive instead of deferring to Congress altogether and employing the constitutional avoidance canon. Congress would still maintain the vast majority of control over immigration matters so that the Court will not interfere with matters of foreign policy. But if the Court established procedural due process standards, individual noncitizens would at least receive a minimum level of constitutional protections. Such protections are even more important now in light of reports that allege significant types of abuse by immigration judges.<sup>240</sup> The type of procedural due process protections envisioned here include an individual determination of dangerousness and flight risk and, most importantly, an appellate review process available to every noncitizen. While it is certainly admitted that these protections would be costly in dollars and cents, it is even more costly to our Constitution to provide unfettered congressional control of immigration matters without a minimum level of constitutional protections.

In fact, in Justice Kennedy’s dissent in *Zadvydas*, he urged the Court to establish just such a set of due process procedures rather than imposing a reasonable time limitation on the discretionary detention of aliens who had been ordered removed.<sup>241</sup> What Justice Kennedy was essentially arguing for was a set of procedures identical to what a citizen receives during a criminal bond hearing. During a bond hearing, an individual determination is made as to that specific citizen’s dangerousness or flight risk, and a bond is set according to that determination. The exact same type of procedure should exist for noncitizens while they

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239. 543 U.S. at 521 (quoting *Mathews v. Diaz*, 425 U.S. 67, 79-80 (1976)).

240. Pamela A. MacLean, *Immigration Judges Rarely Disciplined, Review Finds*, DAILY REPORT, Feb. 6, 2006 at 1 (reporting that immigration judges frequently fall asleep during noncitizen hearings and that immigration judges berate and embarrass noncitizens).

241. 533 U.S. at 718-25 (Kennedy, J., dissenting).

are waiting for their removal hearing and after they have been judged removable.

Unfortunately, because the Court refused to establish any type of due process standards in *Zadvydas*, the Court in *Demore* essentially upheld mandatory detention of noncitizens who are awaiting their removal hearings, despite the absence of an individual determination of dangerousness or flight risk. Rather, the statute in *Demore* required mandatory detention of a noncitizen who is waiting on a removal hearing simply based on prior criminal convictions. Perplexingly, the Court in *Zadvydas* rejected the same proxy—prior criminal convictions—for discretionary detention authority, despite the fact that the noncitizen had already been ordered removed. It makes no sense that a noncitizen who is merely waiting for a removal hearing should receive fewer procedural due process protections than a noncitizen who has actually been ordered removed.

Finally, it is also perplexing that the Court in *Zadvydas* made a specific exception for terrorists in its reasonable time limitation analysis. It is perplexing because the decision to hold a noncitizen after he had been ordered removed was discretionary. It is hard to understand why the Court would carve out an exception for terrorists that would allow the Attorney General to detain terrorists who had been ordered removed for an indefinite period of time but required the Attorney General to release back into society even the most dangerous and violent criminal noncitizens. Instead of carving out exceptions for specific groups of supposedly dangerous aliens, the Court should have simply established a set of procedures that must be followed in order for the Attorney General to detain an alien who has been ordered removed for an indefinite period of time. This perplexing exception could simply be explained by making reference to the terrorist attacks of September 11, 2001. But *Zadvydas* was decided before the terrorist attacks, meaning that theory fails. It is hard to believe the Court saw it as appropriate to send violent criminal aliens back into society that have at least as high a probability of harming U.S. citizens as does a suspected terrorist.

In sum, what is basically argued here is for a broad policy choice as to what rights noncitizens have against detention. Procedural due process protection should mandate that a noncitizen receive an individual determination of his dangerousness or flight risk in order for that noncitizen to be detained. The same procedure should be followed before and after a noncitizen's removal hearing. If such procedures were established, the balance of power over immigration matters would not change significantly because the burden would still be on the noncitizen to demonstrate that he is not dangerous or does not present a flight risk. Additionally, discretionary exceptions could be carved out for the

Attorney General to detain terrorists and other significantly dangerous noncitizens. But the level of proof must be significantly high to maintain protection of the noncitizen's due process right against incarceration. Additionally, there must be an appellate review opportunity for noncitizens when detention is ordered.

BLAKE SHARPTON