NEW YORK LAW SCHOOL

NYLS Law Review

Volume 47
Issue 2 *VOLUME 47, NUMBERS 2-3, FALL 2003*

Article 6

January 2003

THE SPECTRUM OF UNCERTAINTY LEFT BY ZADVYDAS V. DAVIS: Is THE ALIEN DETENTION PROVISION OF THE USA PATRIOT ACT CONSTITUTIONAL?

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THE SPECTRUM OF UNCERTAINTY LEFT BY *ZADVYDAS V. DAVIS*: IS THE ALIEN DETENTION PROVISION OF THE USA PATRIOT ACT CONSTITUTIONAL?

MARK BASTIAN*

Terrorists live in the shadows, under the cover of darkness. We will shine the light of justice on them. Americans alive today and yet to be born and freedom-loving people everywhere will have new reason to hope because our enemies now have new reason to fear.

Attorney General, John Ashcroft

I. INTRODUCTION

On September 11th, 2001, terrorists shocked the world when they hijacked four American airplanes and guided three of them into national landmarks – killing thousands.[1] In the wake of these unexpected tragedies, the United States was suddenly captivated by a sense of fear and vulnerability. Just days after the tragedies, in front of a live national television audience, President George Bush declared that the United States would now engage in a "new kind of war. . . a war on terrorism."[2]

The war on terrorism is unlike any other war this country has ever faced; our enemy targets innocent civilians – on American soil.[3] In response to this unprecedented dilemma, Congress en-

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* This Note was awarded the 2002 Ernst Stiefel Writing Award.

1. Thousands of innocent American civilians were killed in the attacks, conducted at the height of the morning commute: In Washington D.C., 189 people perished (including 64 on American Airlines Flight 77). Outside Pittsburgh, 44 people died on hijacked United Airlines Flight 93. In New York City, 2,830 civilians perished. *A Nation Challenged: The Toll; Toll from Attack at Trade Center is Down Sharply*, N.Y. TIMES, Nov. 21, 2001, at A1.

2. *ABC Special Report: Presidential Address* (ABC television broadcast, Sept. 20, 2001).

3. America's military and economic symbols were targeted in the attacks. Two airplanes were guided into New York City's World Trade Center – America's symbol of economic might. Minutes later, a plane crashed into the Pentagon – America's central military defense center. A fourth plane, which crashed in a Pittsburgh suburb, was believed to be headed toward either the United States Capital building or the White House – both powerful symbols of the United States government. The only other attack

acted the USA Patriot Act,[4] legislation that was designed to grant the government the tools necessary to effectively fight terrorism. One such tool is § 412 of the Act,[5] which enables the Attorney General to detain a terrorist suspect until he is no longer deemed a threat. Of course, this may lead to the indefinite detention of suspected terrorists, if doing so is necessary for national security. Critics argue that the prospect of indefinite detention conflicts with the Supreme Court's holding in *Zadvydas v. Davis*.[6] There, the Court stated that the indefinite detention of aliens[7] was unconstitutional, but left open the possibility of detaining terrorist suspects.[8] This Note argues that the holding in *Zadvydas* would not apply to the USA Patriot Act since Congress acted pursuant to the doctrine of plenary power. Moreover, the war on terrorism represents a "special circumstance" that may necessitate preventative detention.[9]

Part II of this Note will provide an overview of immigration law, plenary power and the alien detention provision of the Patriot Act. Part III will examine the key case in the spectrum of alien detention – *Zadvydas v. Davis*. In addition, this section will lay out the due process challenges to the Patriot Act and the government's argument that the Act falls within the well-established doctrine of plenary power. Part IV will discuss the legality of § 412 based upon plenary power as well as the "special circumstances" exception to due process. Part V will conclude that the *Zadvydas* holding does not apply to § 412 of the Patriot Act since the Act explicitly states

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of this magnitude on American soil was conducted at America's military base in Pearl Harbor, which killed 2,400 Americans. The victims in these attacks were primarily military personnel. *A Nation Challenged: The Toll; Toll from Attack at Trade Center is Down Sharply*, N.Y. TIMES, Nov. 21, 2001, at A1.

4. *See* H.R. 3162, 107th Cong. (2001) (enacted).

5. *See* USA Patriot Act, Pub. L. No. 107-56, § 412(a)(6) (2001).

6. Deborah Barfield, *Critics Wary of Bid to Curtail Rights; A Rush in Response to Terror*, N.Y. NEWSDAY, Oct. 2, 2001, at A04. *See also* Ronald Weich, *Upsetting Checks and Balances, Congressional Hostility Toward the Courts in Times of Crisis*, *at* http://www.aclu.org/safeandfree/ (last visited Nov. 7, 2001) (discussing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

7. The term "alien" means any person not a citizen or national of the United States. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3) (2001).

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

9. In *Zadvydas*, the Supreme Court left open the possibility of a special circumstance. *Id.* at 690, 696.

the powers of the Attorney General and because preventative detention is essential during the war on terrorism.

II. AMERICA'S PERPETUAL STRUGGLE FOR FREEDOM AND SECURITY

A. *Immigration Reform and National Security*

The American government has utilized immigration laws to monitor immigrants and to reduce the threats they may pose to national security. The first such measure was the Immigration and Nationality Act of 1952. The Act granted the Attorney General the authority to arrest and detain aliens while awaiting a determination of whether the alien should be removed from the United States.[10] The Attorney General has since delegated these powers to the Immigration and Naturalization Service (INS).[11]

The threat of terrorism has caused a multitude of reforms to the Immigration and Nationality Act of 1952. On April 19, 1995, Timothy McVeigh,[12] an American citizen, bombed a federal office building in Oklahoma City. The destruction and loss of life were far greater than any act of terrorism to strike the United States up to that point. In total, 168 people lost their lives in the explosion.[13] Congress responded with the enactment of the Antiterrorism and Effective Death Penalty Act[14] ("AEDPA"), legislation designed to combat potential terrorism.[15] Signed into law by President Bill Clin-

10. Immigration and Nationality Act, ch. 8 U.S.C. § 1101-1537 (Supp. 1997)).

11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRAIRA], Pub. L. No. 104-208, 110 (1996).

12. United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998).

13. "On April 19, 1995, at 9:03 a.m., just after parents dropped their children off for day care at the Murray Federal Building in downtown Oklahoma City, the unthinkable happened. A massive bomb inside a rental truck exploded, blowing half of the nine-story building into oblivion. A stunned nation watched as the bodies of men, women, and children were pulled from the rubble for nearly two weeks. When the smoke cleared and the exhausted rescue workers packed up and left, 168 people were dead in the worst terrorist attack on U.S. soil up to that point." *See The Bombing, at* CNN Interactive: Oklahoma City Tragedy, http://www.cnn.com/US/OKC/bombing.html (last visited Nov. 22, 2001).

14. Antiterrorism and Effective Death Penalty Act of 1996 [hereinafter AEDPA], Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C. (Supp. 1997)).

15. *See, e.g.*, Immigration Control and Financial Responsibility Act of 1996, S. 1664, 104th Cong. (1996); The Immigration in the National Interest Act of 1995, H.R. 1915, 104th Cong. (1995). The 103rd Congress generated at least 13 bills relating to

ton, the Act authorized $1 billion to be spent on fighting terrorism in the United States and reserved the right of the government to deny entrance to any foreigner who was believed to be associated with a terrorist organization.[16] The Act also expanded the group of aliens subject to mandatory detention, eliminating provisions that permitted release of criminal aliens who had at one time been lawfully admitted to the United States.[17] Current restrictions of judicial review of deportation orders began with § 440(a) of the AEDPA.[18]

Congress further revised the INA with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Reform Act").[19] The Reform Act liberalized the pre-existing law by shortening the alien removal period from six months to ninety days.[20] Furthermore, it mandated detention of certain criminal aliens during the removal proceedings and for the subsequent ninety day removal period, and added a post-removal provision.[21]

The AEDPA and the Reform Act also enacted the most comprehensive changes in decades to the judicial review provisions of the INA. While both Acts preserved the fundamental structure of

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criminal aliens. *See* Criminal Aliens Hearings, note 1, at 177-82 (statement of Chris Sale, Deputy Commissioner, Department of Justice, Immigration and Naturalization Service).

16. *Id.*

17. AEDPA, Pub. L. No. 104-132, 110 Stat. 1277. The Seventh Circuit held that AEDPA § 440(a) did not violate the Due Process clause because the statute preserves an "independent judicial role in determining whether the alien is deportable. *See* Yang v. INS, 109 F.3d 1185, 1190-91 (7th Cir. 1997) (holding that it is only after the person has been determined, by agency and court, to be an alien who is "deportable" by reason of "serious crimes" that jurisdiction ends. Aliens receive ample protection: trial-type hearings, administrative appeals, and review in an Article III court "of any claim of right to be" in the United States; thus they receive the process that the Constitution requires), *cert. denied sub nom.* Katsoulis v. INS, 522 U.S. 1027 (1997). See also Boston-Bollers v. INS, 106 F.3d 352, 354-55 (11th Cir. 1997) (AEDPA § 440(a) does not violate the due process clause because the Constitution does not give aliens the right to judicial review of deportation orders; rather than violating Article III, § 440(a) illustrates the concept of separation of powers envisioned by the Constitution); Duldulao v. INS, 90 F.3d 396, 399-400 (9th Cir. 1996).

18. *See* Lenni B. Benson, *The Jurisdictional Maze Must Be Understood and Navigated,* N.Y.L.J., June 14, 1999, at 9.

19. AEDPA , Pub. L. No. 104-208, 110 Stat. 3009-546 to 3009-724 (codified in scattered sections of 8 U.S.C. (Supp. 1997)).

20. Illegal Immigration Reform Act of 1996, Div. C, §§ 303, 305, 110 Stat. 3009-585, 3009-598 to 3009-599; 8 U.S.C. §§ 1226(c), 1231(a) (1994 ed., Supp. V).

21. *Id.*

appellate review over individual deportation and removal orders, they imposed many unprecedented restrictions on that review.[22] The AEDPA and the Reform Act form the foundation for the USA Patriot Act – a product of the September 11th attacks.

B. America's Fight Against Terrorism – The Development of the USA Patriot Act

In response to the September 11th attacks, Congress acted quickly to develop legislation that would further enhance homeland security.[23] Just weeks after the events, Attorney General John Ashcroft proposed the 2001 Anti-Terrorism Proposal "Discussion Draft." Most notably, § 202 of Ashcroft's Sept. 19 "Discussion Draft" allowed for the arrest and incarceration for indefinite periods, of any non-citizen whom the Attorney General has "reason to believe may commit, further, or facilitate [terrorist acts, or] engage in any other activity that endangers the national security of the United States."[24] Thus, indefinite detention would be allowed based upon mere suspicion.[25] This was immediately criticized as being beyond the bounds of constitutionality, a harsh infringement on civil liberties, and lacking in adequate procedural safeguards.[26]

Congress eventually agreed on the provisions for the "Uniting and Strengthening America by Providing Appropriate Tools Re-

22. §§ 303, 305 of the Illegal Immigration Reform Act.

23. The Department of Justice detained 952 people in the eight weeks following September 11th. This mass detention of individuals was based on the investigation into the terrorist attacks on America. In order to detain these suspects, the INS utilized an expansive rule put in place on September 17, 2001. Enacted under the agency's rule-making power, it allowed detention, without charge, for an indefinite "reasonable period of time" in "the event of an emergency or other extraordinary circumstance." The INS stated that the rule was needed "to ensure that the Service has sufficient time, personnel and resources to process cases – including establishing true identities" in connection with the September 11th, 2001 attacks. Thus, though the Department of Justice gained broad powers under the USA Patriot Act, it also became constrained by a new seven-day limit on detentions. The Department of Justice may argue that the seven-day provision does not apply to those already detained. *See* John Lancaster, *House Approves Anti-Terrorism Bill: Bush Cheers Lawmakers Quick Action But Civil Liberties Advocates Are Alarmed*, WASH. POST, Oct. 14, 2001, at A21. This Note will not delve into this issue.

24. Stuart Taylor Jr., *Let's Debate – Ashcroft's Bill to Combat Terrorism will Quickly Protect Us and Potentially Hurt Us. So Let's Pass it Now and Rethink it Soon*, LEGAL TIMES, Oct. 1, 2001, at 54.

25. *Id.*

26. *Id.*

quired to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001."[27] Under this Act, 8 U.S.C § 1101 of the Immigration and Nationality Act was amended to allow officials to detain individuals suspected of terrorist activity for up to seven days without filing charges against them or allowing them to petition a court for their release.[28] After the seven days, pursuant to § 412(a)(5), the alien will either be released or detained if there is any immigration violation, subject to deportation hearings.[29] Most notably, the Patriot Act affords the Attorney General the ability to detain an immigrant during the entire deportation hearing if he "reasonably believes" the alien may have engaged or assisted in any terrorist activity and his removal is unlikely in the reasonably foreseeable future.[30] The government is required to review the detention of any non-citizen every six months and show that his or her release would endanger national security or the safety of Americans under § 412(a)(7).[31] In addition, under § 412(b), aliens may challenge their detention in habeas corpus proceedings.[32] The bill routes all such cases exclusively to the District of Columbia district court.[33]

C. The Plenary Power Doctrine

Over the course of the last century the Supreme Court had developed a "hands off" approach to immigration law.[34] This principle of full federal authority and judicial deference is generally known as the "plenary power doctrine."[35] Courts have justified in-

27. H.R. 3162, 107th Cong. (2001) (enacted).

28. H.R. 3162 at § 412(a).

29. *Id.* at § 412(a)(5)

30. *Id.* at § 412 (a)(3)(A); § 412(a)(6). An alien detained solely under paragraph (1) who has not been removed under § 241(a)(1)(A), § 1231. Detention and removal of aliens ordered removed (a) Detention, release, and removal of aliens ordered removed. (1) Removal period. (A) In general. Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of ninety-days (in this section referred to as the "removal period").

31. H.R. 3162 at § 412(a)(7).

32. H.R. 3162 at § 412 (b).

33. H.R. 3162 at § 412 (b)(2).

34. Victoria Cook Capitaine, *Life In Prison Without a Trial: The Indefinite Detention of Immigrants In the United States*, 79 TEX. L. REV. 769, 774 (2001).

35. *See generally* Charles D. Wiesselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 939 (1995) (provid-

voking the plenary power doctrine, and have deferred to the legislative and executive branches, in cases where they perceive national security to be an issue[36] or where they fear that a hostile foreign government is attempting to compel the United States to accept its "undesirable" citizens.[37] The authority of Congress over admission, exclusion, and deportation of aliens is plenary.[38] Congress may exclude aliens altogether,[39] or prescribe the

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ing that the plenary power doctrine is rooted in three related principles: (1) immigration policy is the responsibility of the federal government; (2) the primary federal immigration authorities are the legislative and executive branches; and (3) the judiciary has extremely limited, if any, power to review the immigration decisions of the other branches).

36. *See, e.g.,* United States *ex rel.* Knauff v. Shaugnessy, 338 U.S. 537, 547 (1950). Knauff was a German citizen who sought admission to the United States in 1948. *Id.* at 539. Though she had recently married an American army veteran of World War II, the Court upheld her exclusion from the United States based on unsubstantiated allegations that she was a spy and thus a threat to national security. *Id.*at 547. The Court found Knauff's exclusion without a hearing was permissible because "whatever [the] procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 544 (*citing* Nishimura Ekiu v. United States, 142 U.S. 651, 660, 664 (1892) (upholding the exclusion of an alien without a hearing on the basis that she was likely to become a public charge)).

37. *See, e.g.,* Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (speculating that judicial decisions requiring excludable aliens to be released into American society, when neither their own country nor any other will admit them, could encourage the same sort of problems the United States experienced with Cuba during negotiations over the Mariel boatlift refugees); *see also* Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (expressing the fear that judicial intervention in immigration matters, *i.e.* securing the release of otherwise excludable aliens, would create the intolerable circumstances in which other nations could purposefully send nationals over to the United States, then refuse to take them back, in effect compelling the United States to grant these aliens physical admission, and thus undermining the integrity of the United States borders).

38. Kleindienst v. Mandel, 408 U.S. 753 (1972).

39. *See* Weisselberg, *supra* note 35, at 938 (noting that courts have generally viewed the federal government's immigration authority as an inseparable part of their foreign affairs power); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (advancing the notion that, because a nation's most important function is to maintain security against foreign aggression and to preserve independence, all other concerns must remain subordinate). In the *Ping* case, which became known as the "*Chinese Exclusion Case,*" the Court emphasized that "it does not matter in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us." *See id.* at 6; *see also* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (arguing that because the power to exclude aliens is fundamental to a nation's sovereignty, i.e. the necessity of maintaining normal international relations and defending the country against foreign aggression), it should be exercised exclusively by the political branches of government).

conditions upon which they may come into or remain in the country.[40]

Plenary power has been invoked to shield the actions of Congress and the INS from judicial scrutiny based on the notion that immigration is a matter of foreign affairs.[41] Thus, an inquiry into the constitutionality of an immigration law or action by the INS must first clear the high hurdle of the plenary power doctrine.[42] The Supreme Court held that in order to overcome a constitutional challenge on a matter of immigration, the government must "meet the standard of rationally advancing some legitimate purpose."[43] However, until recently, the exploration into the constitutionality of an immigration matter had become as simple as asking whether the government is acting within the arena of immigration law.[44]

The Supreme Court has recently been hesitant to utilize the doctrine of plenary power. This trend is evident in three recent Supreme Court decisions: *INS v. St. Cyr*,[45] *Nguyen v. INS*,[46] and finally, *Zadvydas v. Davis*.[47] These cases do not explicitly overrule plenary power precedents, but rather, render plenary power inapplicable where past courts would have applied it.[48]

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40. *Id.* at 753.

41. The landmark cases that best exhibit the history of the government's plenary power over immigration matters by the courts include Chae Chan Ping v. United States, 130 U.S. 581 (1889); Wong Wing v. United States, 163 U.S. 228 (1896); United States *ex rel.* Knauff Shaughnessy, 338 U.S. 537 (1950); Carlson v. Landon, 342 U.S. 524 (1952); Harisiades v. Shaugnessy, 342 U.S. 580 (1952); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Galvan v. Press, 347 U.S. 522 (1954); Leng May Ma v. Barber, 357 U.S. 185 (1958); Kleindienst v. Mandel, 408 U.S. 753 (1972); Fiallo v. Bell, 430 U.S. 787 (1977); Jean v. Nelson, 472 U.S. 846 (1985); and Reno v. Flores, 507 U.S. 292 (1993); Zadvydas v. Davis, 121 S.Ct. 2491 (2001).

42. *Capitaine, supra* note 34, at 774.

43. *See Flores*, 507 U.S. at 306.

44. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488-89 (1999) (reasoning that deportation for violation of the immigration laws is not unconstitutional even though one of the reasons for deportation might infringe on freedom of association).

45. INS v. St. Cyr, 533 U.S. 289 (2001).

46. Nguyen v. INS, 533 U.S. 53 (2001).

47. *Zadvydas*, 533 U.S. at 678.

48. Trevor Morrison, *The Supreme Court and Immigration Law: A New Commitment to Avoiding Hard Constitutional Questions?*, FindLaw's Writ, *at* http://writ.findlaw.com/commentary/20010731_morrison.html (last visited Apr. 29, 2003).

The Supreme Court began its apparent shift from the utilization of plenary power in *INS v. St. Cyr.*[49] In *St. Cyr*, the Supreme Court construed a provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) which, on its face, appeared to deprive all courts of jurisdiction to review removal orders.[50] If the Court interpreted the provision that way, however, it would then have to determine whether the provision runs afoul of the Constitution's Suspension Clause.[51] The Suspension Clause provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[52] Thus, assessing the Suspension Clause's implications in the immigration field would have required the Court to balance the Clause against the plenary power doctrine.[53]

Instead of addressing this issue, the Court decided the case based on the avoidance canon – the rule that if a statute can be plausibly construed in more than one way, courts should avoid constructions that would place the statute in constitutional doubt.[54] Under this heightened level of scrutiny, the Court held against the government.[55] The Court's refusal to take the approach that the plenary power doctrine is virtually unlimited reflects some level of discomfort with the doctrine.[56]

The Supreme Court also skirted the issue of plenary power in *Nguyen v. INS.*[57] The government argued that congressional decisions about which foreign-born persons may claim United States citizenship are exercises of its plenary power over immigration.[58] The plenary power, the government urged, mandates judicial deference to those decisions, just as it does to congressional decisions in all other areas of immigration law.[59] Though the Supreme Court sided with the government, it upheld the challenged provisions only after

49. *St. Cyr*, 533 U.S. 289.
50. *Id.*
51. *Id.*
52. U.S. CONST. art. I, § 9, cl. 2.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Nguyen*, 533 U.S. 53.
58. *Id.*
59. *Id.*

subjecting them to what purported to be full constitutional scrutiny.[60]

III. The Debate Emerges: Is the Alien Detention Provision of the Patriot Act Constitutional?

A. *Limits on Alien Detention:* Zadvydas v. Davis

On June 28, 2001, the United States Supreme Court compromised the power of the IIRIRA and arguably, congressional plenary power, with its decision in *Zadvydas v. Davis*.[61] The *Zadvydas* holding also represents the principal argument against the constitutionality of "indefinite"[62] detention of aliens.

The case considered two separate instances of detention.[63] The first involved Kestutis Zadvydas, a resident alien who was born, apparently of Lithuanian parents, in Germany.[64] Zadvydas had a long criminal record involving drug crimes, attempted robbery, attempted burglary and theft.[65] In addition, he had a history of flight from both criminal and deportation proceedings.[66] He was released on parole and taken into INS custody and, in 1994, ordered deported.[67]

Upon his order of removal, the INS made several attempts to have Zadvydas deported to both Lithuania and Germany.[68] Lithua-

60. *Id.*

61. As a result of the holding in *Zadvydas v. Davis*, on July 19, 2001, U.S. Attorney General John D. Ashcroft ordered the Immigration and Naturalization Service to start releasing 3,400 nationals who have completed sentences for criminal convictions in the U.S., but whose home countries will not allow them to return and threatened to sanction their home countries that refuse to accept them. Cheryl W. Thompson, *INS to Free 3,400 Ex-Convicts*, WASH. POST, July 20, 2001, at A2.

62. "Viet Dinh, assistant attorney general for legal policy, disputes the term 'indefinite detention.' The bill, he says, simply allows the Government to revoke the bond of dangerous aliens while they are awaiting deportation proceedings. It is 'well within the bounds of constitutionality,' Dinh says, pointing to the exception for terrorists or national security matters mentioned in the *Zadvydas* opinion." Jonathan Ringel, *Congress is Set to Vote on Measures to Change Criminal and Immigration Law*, FULTON CITY DAILY REPORT, Oct. 11, 2001.

63. *Zadvydas*, 533 U.S. at 678.

64. *Id.* at 682.

65. *Zadvydas*, 533 U.S. at 684.

66. *Id.*

67. *Id.*

68. *Zadvydas*, 533 U.S. at 684.

nia refused to accept him because he was neither a Lithuanian citizen nor a permanent resident.[69] Similarly, Germany would not accept him because he was not a German citizen.[70] Thus, the INS kept him in custody after the expiration of the removal period in order to conduct further attempts to deport him.[71] In September 1995, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 challenging his continued detention.[72]

The second case involved Kim Ho Ma, a Cambodian who fled to the United States at the age of seven.[73] In 1995, at the age of 17, Ma was involved in a gang-related shooting, convicted of manslaughter, and sentenced to thirty-eight months' imprisonment.[74] He served two years, after which he was released into INS custody. In light of his conviction of an aggravated felony, a deportable offense, Ma was ordered removed.[75] Similar to Zadvydas, the country of Ma's birth, Cambodia, refused to accept him before the expiration of the ninety day removal period.[76] Nonetheless, the INS continued to keep Ma in custody because, in light of his former gang membership, the nature of his crime, and his planned participation in a prison hunger strike, the INS was "unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of his release."[77]

Generally, when an alien is found to be unlawfully present in the United States and a final order of removal has been entered, the government secures the alien's removal during a subsequent ninety day statutory "removal period." When the government is unable to remove an alien, like Zadvydas and Ma, further detention is authorized under 8 U.S.C. § 1231 (a)(6). This statute states that a

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Zadvydas*, 533 U.S. at 684.

74. *Id.*

75. *See id. at 685.* (quoting 8 U.S.C. §§1101(a)(43)(F)) (defining certain violent crimes as aggravated felonies), § 1227(a)(2)(A)(iii) (1994 ed., Supp. IV) (aliens convicted of aggravated felonies are deportable).

76. *Id.*

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

removable alien whom poses a risk to the community "may be detained" beyond the ninety day removal period.[78]

The issue in *Zadvydas* was whether 8 U.S.C. § 1231 (a)(6) grants the Attorney General the authority to detain deportable aliens indefinitely or merely for a "period reasonably necessary" after the expiration of the removal period.[79] The government maintained that indefinite civil detention is justified under the statute since it prevents flight and protects the community.[80] Furthermore, the government argued that there was clear congressional intent to grant the Attorney General the power indefinitely to detain an alien ordered removed, and therefore the Court must defer to Congress under the doctrine of plenary power.[81]

In what purported to be full constitutional scrutiny, the Court held that indefinite detention of aliens would raise "serious constitutional concerns," and therefore the statute contains an implicit "reasonable time" limitation.[82] The Court reasoned that if the goal of detention is no longer practically attainable, detention no longer "bears [a] reasonable relation to the purpose for which the individual [was] committed."[83] Therefore, there was a violation of the due process rights of the detainees. The Court stated that the government's first justification, prevention of flight, was "weak or nonexistent where removal seems a remote possibility."[84] Similarly, the Court discounted preventative detention based upon the second justification, protection of the community, since it is limited only to "specially dangerous individuals."[85]

The *Zadvydas* Court did not utilize the doctrine of plenary power and the heightened deference it invokes.[86] The majority found no clear indication that Congress intended to give the Attorney General authority indefinitely to detain aliens.[87] The statute at

78. *Id.* at 682. (quoting 8 U.S.C. § 1231 (a)(6) (Supp. V 1994)).
79. *Id.*
80. *Id.* at 691.
81. *Id.* at 695.
82. *Id.* at 682.
83. *Zadvydas,* 533 U.S. at 690 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)).
84. *Id.*
85. *Zadvydas,* 533 U.S. at 690.
86. *Id.* at 695.
87. *Id.* at 696-97.

issue was premised on 8 U.S.C. § 1231(a)(6), which stated that when an alien has been found unlawfully to be present in the United States and a final order of removal has been entered, the government ordinarily secures the alien's removal during a subsequent ninety day statutory "removal period," during which time the alien normally is held in custody.[88] However, a special statute at issue in *Zadvydas*, authorized further detention if the government fails to remove the alien during those ninety days.[89] It stated:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may* be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.[90]

Ultimately, the Court determined that the word "may" is ambiguous and does not afford the Attorney General unlimited discretion to detain an alien indefinitely.[91] Furthermore, the Court maintained that the protection of the community from dangerous aliens, in this statute, was merely a secondary statutory purpose.[92] Thus, the government's argument under the guise of plenary power was rejected.[93]

Justice Brennan also noted that plenary power is subject to important constitutional limitations.[94] Congressional authority is limited "by the Constitution itself and the considerations of public policy and justice which control, more or less, the conduct of all civilized nations."[95] Here, the Court stated that Congress did not

88. *Id.* at 682.
89. *Id.*
90. *Zadvydas*, 533 U.S. at 2495 (quoting 8 U.S.C. §(a)(6) (1994 ed., Supp. V)).
91. *Id.* at 697.
92. *Id.* at 690-91.
93. *Id.* at 699.
94. *Zadvydas*, 533 U.S. at 695.
95. *Id.* at 695.

utilize constitutional means since aliens are subject to an indefinite term of imprisonment.[96]

The *Zadvydas* majority did state that there might be "special circumstances" that would outweigh an alien's right to due process or allow Congress to utilize the doctrine of plenary power.[97] For example, the Court reasoned that due process can be overcome if the preventative detention is limited to "specially dangerous individuals."[98] The Court stated that the provision authorizing detention in *Zadvydas* "did not apply narrowly to 'a small segment of particularly dangerous individuals,' [like] *suspected terrorists*, but broadly to aliens ordered removed for many and various reasons."[99] Therefore, a key factor in the *Zadvydas* holding was the unlimited scope of the detention provision. With regard to plenary power, the majority holding in *Zadvydas* noted, "neither do we consider terrorism . . . where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[100] In sum, the dictum in *Zadvydas* has left the door open for litigation with regard to alien-terrorist detention.[101]

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96. *Id.* (citing The Chinese Exclusion Case, 130 U.S. 581, 604 (1889).

97. *Id.* at 696.

98. *Id.*

99. *Id.* at 691.

100. *Zadvydas*, 533 U.S. at 696.

101. Pursuant to the decision in *Zadvydas*, the Department of Justice has published an interim rule in the Federal Register to amend the U.S. INS' procedures governing review process of aliens who are subject to a final order of removal, deportation, or exclusion. The interim rule, which was effective as of November 14, 2001, adds new provisions to INS' procedures for determining: (1) whether aliens with final orders of removal are likely to be removed within a reasonable amount of time; and (2) whether they should remain in INS custody or be released into the United States pending their removal. Most notably, the rule also allows the INS to continue detention of aliens who are not reasonably likely to be removed in the reasonably foreseeable future under special circumstances, consistent with the Supreme Court ruling. The special circumstances identified in the regulations involve 1) aliens who have highly contagious diseases that pose a danger to the public; 2) aliens who pose foreign policy concerns; 3) aliens who pose national security and terrorism concerns; and 4) individuals who are specially dangerous due to a mental condition or personality disorder. *Justice Department Implements Zadvydas v. Davis Supreme Court Decision*, Dept. of Justice Webpage (Nov. 14, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/November/01_ins_595.htm.

B. One Provision –Two Conflicting Views

The constitutionality of the alien detention provision of the USA Patriot Act will likely be challenged. Critics maintain that the alien detentions infringe on the due process rights of the detainees. The foundation for this challenge is based upon the holding in *Zadvydas.*[102] The government would likely argue that the Act is justified under the doctrine of plenary power or alternatively, under the "special circumstances" exception to due process. To evaluate a challenge to the Act, the court must first determine what standard of proof to apply – heightened deference or full constitutional scrutiny.[103]

The constitutionality of the Patriot Act may hinge on what level of scrutiny the Court applies. Critics of § 412 will argue that the Act must be subjected to a full constitutional scrutiny. This level of scrutiny is typically applied in due process cases, including *Zadvydas.* In *Zadvydas,* the Supreme Court did not apply a rational basis test since the ability of the Attorney General indefinitely to detain an alien was not based upon clear congressional intent and therefore, did not fall under the scope of plenary power.

However, the Court may decide that the detention of terrorist suspects during the war on terrorism is justified and that the government's actions fall within the scope of plenary power. This argument is supported by the dictum in *Zadvydas*, which states: "special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[104] Thus, under the doctrine of plenary power, the Court would utilize a rational basis test.

After the Court determines which level of review to apply, it will evaluate the argument that the alien detention provision is an unconstitutional violation of due process. Critics of the Patriot Act argue that trifling or unproven immigration violations could be used as pretexts to detain innocent people based on mere suspicions of terrorist designs – thereby infringing on their due process

102. *Id.*

103. Recently, the Supreme Court has not consistently applied either standard in immigration cases.

104. *Zadvydas*, 533 U.S. at 696.

rights.[105] More specifically, the American Civil Liberties Union (ACLU) states, "what amounts to a life sentence should be at minimum based on clear proof at a hearing, not on a certification of merely the level of suspicion that normally allows only a brief stop and frisk[106] on the street."[107] Moreover, the ACLU maintains that the "Court made clear in its analysis that preventative detention would not be allowed in the absence of 'strong procedural protections'. . . it explicitly indicated that indefinite detention would not be allowed 'broadly [for] aliens ordered removed for various reasons, including tourist visa violations.'"[108] The dictum in *Zadvydas*, which suggests that there is a "special circumstances" exception to due process, is discounted as merely dictum.[109] Alternatively, proponents of the Patriot Act argue that the *Zadvydas* decision carves out a special exception for the detention of terrorists, thereby satisfying the standards of due process.[110]

In sum, an analysis on the constitutionality of § 412 must proceed first with a discussion on whether plenary power – and its deferential standard of review would apply. Next, if the Court refuses to apply the doctrine of plenary power, an analysis can proceed as to whether alien-terrorist detention is constitutional under a "special circumstances" exception to due process under a heightened level of scrutiny.

IV. THE CONSTITUTIONALITY OF THE PATRIOT ACT EXAMINED

The constitutionality of the alien detention provision of the USA Patriot Act can be established on two levels. First, the Act grants unambiguous powers to the Attorney General with respect to national security. Therefore, under a rational basis test utilized when the doctrine of plenary power is invoked, § 412 is constitu-

105. Stuart Taylor Jr., *Let's Debate - Ashcroft's Bill to Combat Terrorism will Quickly Protect Us and Potentially Hurt Us. So let's Pass it Now and Rethink it Soon*, LEGAL TIMES, Oct. 1, 2001, at 54.

106. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30 (1968).

107. American Civil Liberties Union, *How the USA Patriot Act Permits Indefinite Detention of Immigrants Who are Not Terrorists*, *at* http://archive.aclu.org/congress/1102301e.html (last visited Mar. 5, 2003).
26, 2001).

108. *See id.*

109. *Id.*

110. Ringel, *supra* note 62.

tional. Second, if the Court does not broach the subject of plenary power, the statute is nevertheless constitutional under the heightened standard applied in *Zadvydas*. Ultimately, a "special argument" can be made that the detention of alien-terrorist suspects is essential to procure national security during the war on terrorism.[111]

A. The Applicability of the Plenary Power Doctrine

The provision that entails the possibility of indefinite detention in the Patriot Act is distinguishable from 8 U.S.C. § 1231(a)(6), ruled unconstitutional in *Zadvydas*. In § 412(a)(5) of the USA Patriot Act, it states:

> The Attorney General shall place a [certified][112] alien in removal proceedings, or shall charge the alien with a criminal offense, not later than seven days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.[113]

After the seven days, if it is determined that the alien will either have criminal or immigration charges filed against him, § 412(a)(6) places a limitation on indefinite detention:

> An alien detained [as a certified alien] who has not been removed under § 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.[114]

The important difference between 8 U.S.C. § 1231 and § 412 (a)(6) of the USA Patriot Act lies in the specificity of the alien detention guidelines. In 8 U.S.C. § 1231, the alien "may be detained

111. The term "special argument" was coined in *Zadvydas* to describe instances where "preventative detention" and "heightened deference to the judgments of the political branches with respect to matters of national security" could be made. *See Zadvydas*, 533 U.S. at 696.

112. USA Patriot Act, Pub. L. No. 107-56, § 412(a)(3);(a)(5);(a)(6) (2001).

113. § 412(a)(3).

114. § 412(a)(5).

beyond the removal period."[115] The Supreme Court maintained that this was too ambiguous and therefore beyond the scope of plenary power.[116] However, the Patriot Act, § 412(a)(6), explicitly states that the alien may be detained for "additional periods of up to six months . . . if the release of the alien . . . will threaten national security."[117] Thus, there is no longer an undefined period as to which aliens may be detained, but rather, a specified length of time of six months provided in the statute. "Congress has made its intent in the statute clear, [and the court, therefore], must give effect to that intent."[118]

In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.[119] The deferential stance with respect to immigration matters is taken since: "decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."[120]

The USA Patriot Act is explicit with regards to the power of the Attorney General indefinitely to detain terrorist suspects.[121] Therefore, the Court is more likely to utilize the doctrine of plenary power as the basis for a holding of constitutionality. However, as in *Zadvydas*, if the Court rejects the application of plenary power while interpreting the USA Patriot Act, the Court then will proceed with a due process analysis.

B. The Due Process Argument Analyzed

The Fifth Amendment's Due Process Clause forbids the government from depriving any person of liberty without due process

115. § 412(a)(6).
116. *Zadvydas*, 533 U.S. at 696.
117. § 412(a)(6).
118. *Zadvydas*, 533 U.S. at 696 (citing Miller v. French, 530 U.S. 327 (2000)).
119. Mathews v. Diaz, 426 U.S. 67, 79 (1976).
120. *Id.* at 81.
121. *See supra* Part II.B.

of law.[122] Liberty interests are not impenetrable, however, because "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[123] Government detention will be upheld in certain "special and 'narrow' non-punitive 'circumstances' where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[124] For example, in times of war or insurrection, the government may detain individuals it deems dangerous, or suspend the writ of habeas corpus.[125] The constitutionality of detention, therefore, rests in large part on its purpose.[126] A court must examine whether the deprivation of liberty is imposed for the purpose of punishment or rather in furtherance of regulatory goals and, if in furtherance of regulatory goals, whether the deprivation is excessive in relation to the purpose of deprivation.[127] Furthermore, the provision must be targeted to a "small segment" of individuals and must apply strong procedural protections. The same inquiry is required for immigration deprivation.[128]

1. The War against Terrorism: A "Special Circumstance"

The alien detention provision of the USA Patriot Act serves three purposes. First, it grants the Department of Justice the ability to continuously investigate individuals it reasonably believes may

122. *See* U.S. CONST. amend. V ("No person shall be. . . deprived of life, liberty, or property, without due process of law.").

123. United States v. Salerno, 481 U.S. 739, 748 (1987).

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

125. The government's ability to detain individuals it deems dangerous was shown in the holding in *Korematsu v. U.S.* *See* Korematsu v. United States, 323 U.S. 214 (1944). There, the Supreme Court upheld the constitutionality of internment camps which were the impetus for the internment of 110,000 Japanese-Americans during World War II. *Id.* In 1861, during the Civil War, there was a suspension of the writ of habeas corpus – the right to know why a person is detained to ensure that the imprisonment is not illegal. President Abraham Lincoln revoked the right for secessionists and those suspected of disloyalty. *See e.g.*, Halbert, *Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM.J. LEGAL HIST. 95 (1958) (discusses the circumstances surrounding President Lincoln's decision to suspend the writ of habeas corpus).

126. *See Salerno*, 481 U.S. at 748 (citing *Carlson*, 342 U.S. 524); Addington v. Texas, 441 U.S. 418 (1979); *Jackson*, 406 U.S. at 715).

127. *See Salerno*, 481 U.S. at 747.

128. *See* Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1441-42, *amended by*, 997 F.2d 1122 (5th Cir. 1993) (citing Schall v. Martin, 467 U.S. 253, 268-269 (1984), which discusses balancing the length of detention with regulatory goals).

have an involvement in terrorism. Second, it protects the nation from any subsequent terrorist activity that the alien may engage in. Third, it ensures the alien-terrorist suspect will be present at a future deportation hearing.

The first justification behind § 412 of the Patriot Act is that it allows the Department of Justice to continuously investigate individuals it reasonably believes may have involvement in terrorism. In essence, mass detention of terrorist suspects will assist authorities in the largest criminal investigation in U.S. history. The complexity of the case requires officials to hold on to anyone who may have information, especially if that person already is living illegally in the United States. Ordinarily, while alien removal proceedings are in progress, most aliens may be released on bond or paroled.[129] Along with the increased latitude to detain comes enormous responsibility. No one wants a situation in which they would have to release a possible terrorist on some technicality.[130]

Next, the detention of the alien-terrorist suspect protects the nation from any subsequent terrorist activity that the alien may engage in. The Patriot Act prevents instances where terrorists can be released on bond, only to commit crimes of mass murder.[131] Their ability to be released on bond, and subsequently escape, would put the nation in grave danger. Consider the unprecedented problem that may well be presented by some of the individuals that the Justice Department has arrested or taken into custody for questioning

129. 8 U.S.C.S. § 1226(a)(2)(c) (2003).

130. Stuart Taylor Jr., *How to Minimize the Risks of Overreacting to Terrorism*, NAT'L L.J., Sept. 29, 2001. To immigration lawyer Angela Kelley, the mass detentions point to "the beauty of immigration laws" to assist authorities in the largest criminal investigation in U.S. history. The complexity of the case requires officials to hold on to anyone who may have information, especially if that person already is living illegally in the US. She said, "we're all equally shocked and appalled by these terrorists acts." Ms. Kelley, the deputy director of the nonpartisan National Immigration Forum, also stated: "and we're hoping for our own sake and our kids' sake it never happens again. All eyes are on the INS right now." She said, "they're going to be very careful to cross their T's and dot their I's. Nobody wants a situation in which they would have to release a possible terrorist on some technicality." *Id.*

131. 142 Cong. Rec. 7972 (1996). The government cited statistical studies showing high recidivism rates for released aliens (77%) in the congressional floor debates on the Antiterrorism and Effective Death Penalty Act of 1996.

with regard to the September 11th attacks.[132] Assume that after a more expansive investigation, many of those arrested prove to be entirely uninvolved in terrorism or other illegality; that the government uncovers enough evidence to charge many others with immigration violations or crimes, perhaps including complicity in the September 11th mass murders; and that the information available on the others (e.g., twenty-five of them) would leave a reasonable prosecutor or judge thinking: "This man is probably no threat, but there's maybe one chance in three, or four, or five, or ten that he's a terrorist bent on mass murder."[133] What should the government and the courts do with those suspects in this last group? With, for example, a (hypothetical) Pakistani biochemistry major at Princeton University who had downloaded articles about how terrorists might use small planes to start an anthrax epidemic, and had shown an intense but unexplained interest in crop-dusters?[134] Or, perhaps, with a (hypothetical) Iraqi refugee who had been photographed at a Beirut restaurant frequented by followers of Osama Bin Laden, had recently toured New York City's Empire State Building three times during a one-week trip to New York, and had left in his motel room a news article detailing how terrorists might succeed in leveling a high-rise building through the strategic placement of explosives.[135] If these two individuals were held for deportation hearings and there was not a foreseeable deportation proceeding, then under a strict interpretation of the *Zadvydas* case, they must be offered bond or be released.

The fact is, Americans were frightened by the prospect of terrorism before either the Oklahoma City bombing or the attacks of September 11th, 2001.[136] Now that this fear has been substantiated,

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132. Stuart Taylor Jr., *Let's Debate - Ashcroft's Bill to Combat Terrorism Will Quickly Protect Us and Potentially Hurt Us. So Let's Pass it Now and Rethink it Soon*, LEGAL TIMES, Oct. 1, 2001, at 54.

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* Natsu Taylor Saito, *Symbolism Under Siege: Japanese Americans Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1 (2001). This article makes reference to, and criticizes, a study that noted that the American and Canadian public consider terrorism a bigger threat to their personal safety than driving on the freeways, even though the number of U.S. citizens killed in terrorist incidents around the world the year of the poll was only one quarter the number killed that year by lighting.

and the government is on notice to the threat of future attacks, preemptive actions must be taken. Therefore, it is reasonable to detain an individual that may be a terrorist until further investigation is completed.

Finally, § 412 ensures that the terrorist suspect will be present at future deportation hearings. In the months following September 11th, over 1,000 people were detained for possible connections to the attacks. Many of these individuals are being held in custody based on a violation of immigration status – they have violated the law.[137] Attorney General John Ashcroft states that the Department of Justice must have the ability to keep them in jail and not have them bonded out. Statistical studies show high recidivism rates for released aliens.[138] One Government Accounting Office study, cited by Congress in floor debates on the Antiterrorism and Effective Death Penalty Act of 1996, put the figure as high as seventy-seven percent.[139] This means that over three-quarters of those aliens that have an immigration hearing fail to appear. This must not be allowed to happen with potential terrorists. "Illegal aliens who have links to those who are part of a terrorist network, pose an increased risk and must be kept off the streets."[140]

2. The "Small Segment" Defined

In addition to the presence of "special circumstances," a law that provides for the potential of indefinite detention must apply to a "small segment" of individuals.[141] Here, the law allows the Attorney General to detain an alien where there are "reasonable grounds" to believe he has: (A) engaged, *inter alia*, in security violations that include espionage, sabotage, and a multitude of terrorist activities;[142] or, (B) is engaged in any other activity that

137. *Id.*

138. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 91-190, 110 Stat. 1214 (1996).

139. *Id.*

140. Joyce Howard Price, *Ashcroft Urges Stricter Laws to Jail Alien Suspects Longer*, WASHINGTON TIMES, Oct. 1, 2001, at A1.

141. *Zadvydas*, 533 U.S. at 667.

142. § 412 (a)(3) states that "the Attorney General may certify an alien. . . if he has reasonable grounds to believe that the alien is described in §§§§§§ 212(a)(3)(A)(i), 212 (a)(3)(A)(iii), 212 (a)(3)(B), 237 (a)(4)(A)(i), 237 (a)(4)(A)(iii), or 237 (a)(4)(B). The full text of these provisions are described below: § 212(a)(3)(A)(i): "(3)

Security and related grounds. (A) In general. Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in— (i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information." § 212(a)(3)(A)(iii): "any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is inadmissible." § 212(a)(3)(B): "(B) Terrorist activities. (i) In general. Any alien who— (I) has engaged in a terrorist activity, (II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iii)), (III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity, (IV) is a representative (as defined in clause (iv)) of a foreign terrorist organization, as designated by the Secretary under section 219 [8 USCS § 1189], or (V) is a member of a foreign terrorist organization, as designated by the Secretary under section 219 [8 USCS § 1189], which the alien knows or should have known is a terrorist organization is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity. (ii) Terrorist activity defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained. (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person. (IV) An assassination. (V) The use of any— (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. (VI) A threat, attempt, or conspiracy to do any of the foregoing. (iii) Engage in terrorist activity defined. As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts: (I) The preparation or planning of a terrorist activity. (II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity. (IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization. (V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

endangers the national security of the United States.[143]

It is important to differentiate those who are arrested on immigration grounds, and therefore subject to questioning and deportation, and those who are deemed terrorist threats subject to prosecution and possibly deportation. Each alien who violates immigration laws or local laws can expect to be taken into custody.[144] Like an American citizen, rule-violators are subject to punishment under the law. Predictably, the war on terrorism has amplified the enforcement of even relatively minor infractions. The Attorney General warned at the Mayor's conference that if a terrorist overstays his visa – even by one day – he will be arrested.[145] Moreover, Ashcroft stated that if a suspected terrorist violates a local law, he will be placed in jail and kept in custody as long as possible.[146] This is an unconventional war where every available statute must be utilized in order to gain a prosecutorial advantage. If suspects are found not to have links to terrorism or not to have violated the law, they are released.[147] But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases prevented from doing further harm to Americans.[148] However strict this may seem to those aliens with no ties to terrorism, it must be expected at times of war when the enemy is relatively unknown.

(iv) Representative defined. As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity."

§ 237(a)(4)(A)(i): "(4) Security and related grounds. (A) In general. Any alien who has engaged, is engaged, or at any time after admission engages in— (i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information."

§ 237(a)(4)(A)(iii): "any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable."

§ 237(a)(4)(B): "Terrorist activities. Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in § 212(a)(3)(B)(iii) [8 USCS § 1182(a)(3)(B)(iii)]) is deportable."

143. § 412 (a)(6).

144. John Ashcroft, *Attorney General's Prepared Remarks for the United States Mayor's Conference*, Oct. 25, 2001.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

The Patriot Act provides that the Attorney General may detain an alien if he has reasonable grounds to believe he is either a threat to national security or is involved in an activity related to terrorism or government overthrow.[149] Critics maintain that the reasonable grounds standard is subject to abuse because it is too subjective.[150]

In times of war, it is unreasonable to expect the Department of Justice to furnish evidence amounting to probable cause for each suspected terrorist. Terrorists operate on a variety of levels. As the hypothetical presented in section (IV)(B)(1) illustrates, some activities by aliens raise serious concern. However, this concern may not reach the level of probable cause – at least not without further investigation.

All Americans must expect restrictions on their personal freedoms. Supreme Court Justice Sandra Day O'Connor recognized this after inspecting the disaster site in New York City: "We're likely to experience more restrictions on our personal freedom than has ever been the case in this country."[151] Simply stated, if we do not prevent terrorists from taking away our liberties, we will not have any liberties and we will not have the freedoms that we have all taken for granted.

B. The Disparate Impact on the Arab Community

Undoubtedly, the Act will have the most effect upon the Muslim and Arab communities.[152] The Government did not explicitly target ethnic groups, however. The detention based upon legitimate immigration violations and subsequent terror inquiries are a product of circumstance. Ultimately, the government gained substantial evidence that the acts of terrorism were carried out by members of the Al-Qaeda terrorist network, which is largely made

149. *See supra* note 27.

150. *How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants Who Are Not Terrorists*, American Civil Liberties Union (Oct. 23, 2001), *available at* http://www.aclu.org/congress/1102301e.html.

151. *Id.*

152. In the United States, there are approximately 6.5 million Muslims and about 3 million persons of Arab descent, some of whom are Muslim but most of whom are Christian. *Muslims Move into Political Arena in U.S.*, FLORIDA TIMES-UNION, October 22, 1999, *available at* 1999 WL 29069360.

up of Muslim, middle-eastern males. Therefore, it is more likely to scrutinize and detain individuals who fit this description.

Regardless, if de jure discrimination were proven, the Act would still withstand constitutional challenge under established Supreme Court precedent. For example, in the landmark case of *Korematsu v. United States*, the high court held that "pressing public necessity may sometimes justify racial restrictions."[153] *Korematsu* has yet to be overturned, and it demonstrates the extent to which the Supreme Court will go to allow the other branches of government leeway during war. In a recent book on civil liberty and wartime, Chief Justice William H. Rehnquist defended much of the *Korematsu* decision, including the central principle that courts must defer to the government where national security is at stake.[154]

V. CONCLUSION

America's Founding Fathers[155] had a very important conception of freedom. It wasn't just freedom to do anything or to associate for any purpose, but to do those things that do not harm others and which, it was hoped, would advance the common good. Douglas Kmiec,[156] before the Senate Judiciary Committee, intimated that freedom separated from truth is not freedom at all but license and

153. Korematsu v. United States, 323 U.S. 214 (1944).

154. Chief Justice William Rehnquist stated his strong support of the Korematsu decision in his recent book.

155. Ellsworth (Elsworth), Oliver, Johnson, William S., Sherman, Roger, Bassett (Basset), Richard Bedford, Gunning, Jr., Broom, Jacob, Dickinson, John, Read, George, Baldwin, Abraham, Few, William, Houstoun, William, Pierce, William L., Carroll, Daniel, Jenifer, Daniel of St. Thomas, Martin, Luther, McHenry, James, Mercer, John F., Gerry, Elbridge, Gorham, Nathaniel, King, Rufus, Strong, Caleb, Gilman, Nicholas, Langdon, John, Brearly (Brearley), David, Dayton, Jonathan, Houston, William C., Livingston, William, Paterson (Patterson), William, Hamilton, Alexander, Lansing, John, Jr., Yates, Robert, Blount, William, Davie, William R., Martin, Alexander, Spaight, Richard D., Williamson, Hugh, Clymer, George Fitzsimons (FitzSimons; Fitzsimmons), Thomas, Franklin, Benjamin, Ingersoll, Jared Mifflin, Thomas, Morris, Gouverneur, Morris, Robert, Wilson, James, Butler, Pierce Pinckney, Charles, Pinckney, Charles Cotesworth, Rutledge, John, Blair, John Madison, James, Mason, George, McClurg, James, Randolph, Edmund J., Washington, George, Wythe, George. See The Founding Fathers, Delegates to the Constitutional Convention, National Archives and Records Administration, *available at* http://www.nara.gov/exhall/charters/constitution/confath.html (last visited Nov. 22, 2001).

156. Douglas Kmiec is the Dean of Columbus School of Law, Catholic University of America.

Congress can no longer afford, if it ever could, to confuse freedom and license, because in doing so, license is not freedom, but terrorism.[157]

The USA Patriot Act, signed into law by President George W. Bush on October 25, 2001, affords the Attorney General the authority to detain dangerous terrorist suspects, subject to a multitude of safeguards.[158] Since the USA Patriot Act explicitly states the powers of the Attorney General, and because preventative detention is essential during the war on terrorism, the Supreme Court's recent holding in *Zadvydas*, that indefinite detention of aliens was unconstitutional, would not apply. Therefore, the Supreme Court must resist any attempt to utilize the narrow holding in *Zadvydas* as a mechanism to overturn § 412 of the USA Patriot Act.

157. *Protecting Constitutional Freedoms From Infringement By Counterterrorism Efforts, 2001:*
Hearing Before the Federalism and Property Rights Subcomm., Senate Judiciary Comm., 107th Cong. (statement of Douglas Kmiec, Dean, Columbus School of Law) (Oct. 3, 2001).

158. H.R. 3162, 107th Cong. (2001) (enacted).