Dislocations in the Balance of Power: Due Process Rights of Deportable and Excludable Aliens in the Wake of Zadvydas v. Davis

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Dislocations in the Balance of Power:
Judicial Encroachment on Congress’s
Plenary Power over Immigration Law
in the Wake of Zadvydas v. Davis

By Amanda S. Reid

Foreign affairs, including immigration policies, are within the domain of the political branches of the U.S. Federal Government. The U.S. Constitution empowers Congress “[t]o establish a uniform rule of naturalization . . . throughout the United States.”\(^1\) Over the last hundred years since the Chinese Exclusion Case of 1889,\(^2\) the Supreme Court’s recognition of Congress’s plenary power over immigration and judicial deference to it has become deeply engrained in the law.\(^3\) In 1893, the Supreme Court, in *Fong Yue Ting*,\(^4\) found that “[t]he power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same [sovereign] power.”\(^5\)

“Exclusion” prevents someone from entering the United States who is actually outside of the United States or is treated as being so.\(^6\) On the other hand, “expulsion” forces” someone out of the United States who is actually within the United States” and “deportation” moves “someone away from the United States, after

\(^1\) U.S. Const. art. I, §8, cl.4.

\(^2\) Chae Chan Ping v. United States, 130 U.S. 581 (1889).


\(^4\) 149 U.S. 698, 713 (1893).

\(^5\) Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

his exclusion or expulsion." 7 A territory-based approach is predicated on a belief that those inside the borders have developed greater ties to the community than those standing outside the borders. 8 While the power to expel or exclude is singular, immigration law draws a bright line between excludable and removable aliens based on the idea of entry. 9 In effect there are three classes of aliens: those who are legally within the U.S., those who may be removed, and those who have not entered and may be excluded.

The Fifth Amendment’s Due Process protections extend to all persons within the borders of the United States. 10 Due process protects both fundamental procedures that ensure fairness, as well as substantive liberty interests that the government may not infringe without a compelling justification. 11 Liberty interests protected by the Due Process Clause include protection against unlawful or arbitrary personal restraint or detention. 12 The Supreme Court has emphasized that the role of the Judiciary in immigration matters is limited to determining whether the procedures met the essential standard of fairness for due process. 13 The Judiciary’s role explicitly does not extend to imposing

7 Id.

8 See Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[A]n 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. 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.").


10 Id.

11 The Supreme Court began its substantive due process jurisprudence in 1905 with Lochner v. New York, 198 U.S. 45 (1905), when the Court struck down a New York law that set maximum hours for bakery employees to protect employees substantive economic and property rights.


procedures that displace Congressional policy choices. The role of courts is merely to evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process for aliens.

Inquiring beyond basic procedural due process issues becomes a political question. Although the elements of a political question may vary, the Court in *Baker v. Carr* said it is essentially a product of the separation of powers. The Court explained an example of a political question case would include one that involves an issue within the domain of a coordinate political branch, or one that lacks judicial standards to resolve the question, or if it requires a policy decision clearly for non-judicial discretion, or is impossible to resolve without showing a lack of respect for coordinate branches of government, or raises the possibility of embarrassment by not speaking with one voice on a question. In foreign affairs, including immigration, the Court generally defers to the Congress and the Executive to decide inherently political matters.

The statutory changes to immigration law in 1996 reflect Congress’s interest to abandon the focus on entry to the United States, and instead focus on a notion of admission to distinguish between classes of aliens. However, in 2001, the Supreme Court in *Zadvydas v. Davis* further entrenched the distinction between classes of aliens based on where they stand in relation to the United States border. This distinction that the Court reinforced is to the detriment of excludable aliens. The Court missed a golden

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14 *Id.*

15 *See id.*


17 *See id.*


opportunity to eliminate the perverse hierarchy and disparate treatment of aliens based on geographic presence.

An historical discussion of Congress's plenary power over immigration matters is traced in Part I of this essay. The due process rights of aliens and the rights hierarchy the Court has created is explained in Part II. Part III of this essay looks at recent statutory changes to federal immigration policies. Part IV discusses the recent case of Zadvydas v. Davis and Part V offers some insights about possible effects of the Court's ruling.

I. Congress's Plenary Power

A. Congress's Power over Entry

For more than one hundred years, the Supreme Court has recognized the plenary power of Congress to "establish a uniform rule of nationalization" and precluded rigorous review of immigration regulations by the courts. In the 1889 Chinese Exclusion Case, the Supreme Court described Congress's power to exclude aliens from entry into the United States as "an incident of sovereignty" and held that Congress's determination of its sovereign powers over immigration is "conclusive upon the judiciary." The Chinese Exclusion Case involved the constitutionality of an act of Congress that invalidated certificates of reentry previously issued to Chinese laborers prior to their departure. The Court found that a certificate issued under a previous law allowing reentry into the United States could be

21 Chae Chan Ping v. United States, 130 U.S. 581 (1889).
22 Id. The Court noted that "[t]he power of exclusion of foreigners belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one." Id.
23 Id. at 606.
24 Id. at 589.
nullified by a subsequent act of Congress because the power to exclude foreigners is a part of the sovereign powers delegated by the Constitution.\textsuperscript{25}

In the 1893 \textit{Fong Yue Ting} case, the Court recognized that Congress’s plenary power over immigration regulation includes the power to expel as well as exclude: “\textit{[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government.}”\textsuperscript{26} Furthermore, the power over aliens is regulated by “Congress, and executed by the executive authority except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.”\textsuperscript{27} Congress enacts immigration laws, the Executive enforces them, and only in exceptional situations may the Judiciary “intervene.”

This sentiment was again echoed by the Court in a 1918 case, \textit{Oetjen v. Central Leather Company}: “\textit{[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.}”\textsuperscript{28} The Judiciary categorically may not substitute its political preferences for those decisions made by the political branches.

This tradition of strict judicial deference to Congress in immigration regulation endured into the 1950’s. It reemerged in the Court’s opinions during the turbulent times of the Cold War where suspicion of foreigners residing in the United States peaked. In the 1950’s, the Court reaffirmed the plenary power of the political branches to determine immigration issues and explained that “\textit{[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the

\begin{footnotes}
\footnote{25} \textit{Id.} at 609.
\footnote{26} \textit{Fong Yue Ting} v. United States, 149 U.S. 698, 713 (1893).
\footnote{27} \textit{Id.}
\footnote{28} \textit{Oetjen} v. Central Leather Co., 246 U.S. 297, 302 (1918).
\end{footnotes}
nation.” Moreover, “[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.” The Court continued to hold that immigration policies were subject only to limited judicial review.

**B. Plenary Power Beyond Entry**

The plenary power of Congress over aliens has been respected beyond mere regulation of exclusion and deportation. The Court has upheld statutes denying Social Security and Medicare benefits to aliens. In *Flemming v. Nestor*, Ephram Nestor, an alien who had lived in the United States for forty-two years, was deported because he had been a member of the Communist Party from 1933 to 1939. Pursuant to the Social Security Act, his deportation resulted in the termination of his social security benefits payable to his spouse. The Court found that an alien’s right to social security benefits was not an accrued property right, but rather a privilege granted by Congress much like the privilege of entry into the United States, therefore, terminating his benefits was not a violation of due process.

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31 *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n. 21 (1976) (“[T]he authority to control immigration is not only vested solely in the Federal Government ... but also ... the power over aliens is of a political character and therefore subject only to narrow judicial review.”); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”).


33 *Id.* at 605.

34 *Id.*
Respecting Congress's plenary power over aliens, the Court explained that, "the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Thus, implicit in the Court's reasoning is that alien status is not included as one of the "suspect classifications" which receives strict scrutiny under an equal protection framework.

Equal protection of the laws is guaranteed by the Fourteenth Amendment. Laws must treat similarly situated individuals similarly; laws should be applied equally to individuals or classes. Over the years the Court has outlined different occasions that warrant different levels of judicial scrutiny. Suspect classifications such as race and gender receive strict scrutiny from the courts to ensure equal application of the laws.

This heightened level of scrutiny was not applied to resident aliens in a 1976 case. In *Mathews v. Diaz*, a unanimous Court reaffirmed its deference to Congress to regulate alien's eligibility for government benefits. Resident aliens over sixty five years old challenged the constitutionality of a federal statute that required that before resident aliens could receive Medicare benefits, they must have been admitted for permanent residence and have resided continuously in the United States for at least five years.

The Court held that these statutory requirements did not violate the Due Process Clause. While resident aliens cannot be

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35 *Id.* at 611.

36 U.S. CONST. amend. XIV, § 1. In pertinent part the amendment states, "No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." *Id.* Professor Peter Westen distinguishes equality from rights. He defines "equality" as "the proposition in law and morals that 'people who are alike should be treated alike' and its correlative, that 'people who are unalike should be treated unalike.'" Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-40 (1982). And "rights" are defined as "all claims that can justly be made by or on behalf of an individual or group of individuals to some condition or power—except claims that people who are alike be treated alike." *Id.* at 540.


38 *Id.* at 69-70.

39 See *id.* at 78-85.
deprived of life, liberty and property without due process of law, they are not entitled to enjoy all the advantages of citizenship.\textsuperscript{40} The legitimate distinctions between citizens and aliens justified benefits being accorded to one class and not to the other.\textsuperscript{41} The Court noted that although Congress often created rules for aliens that would be unacceptable for citizens, such disparate treatment was not invidious.\textsuperscript{42} The Court found that Congress had the authority to set a policy providing that as an alien’s ties to the nation and community grow, the claim to a greater share of government benefits may also grow.\textsuperscript{43} The Court reasoned that it was within Congress’s authority to decide that citizens, and those who are most like citizens, are entitled to benefits, whereas those who are less like citizens do not.\textsuperscript{44}

In \textit{Diaz}, the Court cautioned that judicial pronouncements that may inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.\textsuperscript{45} The Court reasoned that decisions in immigration matters affect relations with foreign powers, vary in the light of changing political and economic circumstances, and require the flexibility of policy choices.\textsuperscript{46} Therefore, immigration issues are more appropriately decided by Congress or the Executive, rather than the Judiciary.\textsuperscript{47}

The Court in \textit{Nestor} and \textit{Diaz} merged Congress’s power to outline government benefits eligibility and its plenary power over immigration issues. The Court used language suggestive of equal

\textsuperscript{40} Id.
\textsuperscript{41} Id. at 78. A number of constitutional and statutory provisions rely on the distinction between citizens and aliens to award benefits and entitlements. \textit{Id}. However, the Fifth and Fourteenth Amendments protect all people within the United States, even those whose presence is unlawful, involuntary, or transitory. \textit{Id}. at 77.
\textsuperscript{42} Id. at 79-80.
\textsuperscript{43} Id. at 80.
\textsuperscript{44} Id. at 83.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
protection considerations when discussing "patently arbitrary classifications." Yet it declined to apply a heightened level of scrutiny to Congress’s immigration laws. Until very recently, the Court has shown great deference to the plenary power of Congress to decide immigration matters, including when the power extends beyond merely controlling the borders.

II. Due Process Clause of the Fifth Amendment

A. Due Process Rights of Aliens

In Plyler v. Doe, the Court held that, "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments." As early as 1896, the Court extended due process rights to aliens held in detention pending deportation. Wong Wing, Lee Poy, Lee Yon Tong and Chan Wah Dong were unlawfully within the United States and were not entitled to stay. A federal district judge sentenced them to hard labor for six days, and then ordered them deported to China. In Wong Wing v. United States, the Court acknowledged that "[p]roceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." The Court went on to explain that "detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense." However, "punishment by

50 Id. at 210.
51 Wong Wing v. United States, 163 U.S. 228 (1896).
52 163 U.S. 228 (1896).
53 Id. at 235.
54 Id.
imprisonment at hard labor” prior to deportation would not be consistent with the Fifth Amendment’s due process clause.\textsuperscript{55}

In \textit{Reno v. Flores},\textsuperscript{56} a 1993 case involving alien juveniles arrested and held in INS custody pending deportation, the Court described the contours of the “substantive due process” rights that aliens enjoy. Due process of law, guaranteed by the Fifth and Fourteenth Amendments, includes a substantive component, “which forbids the government to infringe certain ‘fundamental’ liberty interests \textit{at all}, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”\textsuperscript{57} \textit{Substantive} due process protects fundamental liberty interests, while \textit{procedural} due process ensures fairness in an administrative or judicial hearing.

\section*{B. Indefinite Detention of Aliens}

In the early 1950’s, during the height of the Cold War, the Supreme Court affirmed the government’s indefinite detention of excludable aliens.\textsuperscript{58} In \textit{United States ex rel. Knauff v. Shaughnessy},\textsuperscript{59} the Court stated that any procedures Congress authorized were due process as far as an alien denied entry was concerned.\textsuperscript{60} Ellen Knauff was born in Germany in 1915, but left for Czechoslovakia during the Nazi regime.\textsuperscript{61} She went to England in 1939, as a refugee and served with the Royal Air Force from 1943 to 1946.\textsuperscript{62} In 1948, while in Germany, she married Kurt W. Knauff, a naturalized citizen of the United States, and soon

\textsuperscript{55} \textit{Id.} at 238.
\textsuperscript{56} 507 U.S. 292, 301-02 (1993).
\textsuperscript{59} 338 U.S. 537 (1950).
\textsuperscript{60} \textit{Id.} at 544.
\textsuperscript{61} \textit{Id.} at 539.
\textsuperscript{62} \textit{Id.}
thereafter tried to join her husband in the United States as a naturalized citizen. While awaiting entry at Ellis Island, Knauff was ordered by INS to be permanently excluded on the ground that her admission would be "prejudicial to the interests of the United States."

The Court upheld the INS order of exclusion. The Court reasoned that admission to the United States is a privilege granted by the sovereign government and subject to the procedures the government chooses to provide. Because the exclusion of aliens is a fundamental act of sovereignty, "[t]he right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." The Court stated, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." Therefore, concerning an excludable alien, "[w]hatever the procedure authorized by Congress is, it is due process. . . ."

Three years later, in Shaughnessy v. United States ex rel. Mezei, the Court again upheld the INS's indefinite detention of an excludable alien by finding that it did not violate the Due Process Clause. Ignatz Mezei petitioned for a writ of habeas corpus, challenging the legality of his imprisonment, alleging that indefinite detention on Ellis Island violated his due process

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63 Id.
64 Id. at 539-40.
65 Id.
66 Id. at 542.
67 Id.
68 Id. at 543.
69 Id. at 544.
70 345 U.S. 206 (1953).
71 Id. at 207, 210-12.
Mezei's detention on Ellis Island began when neither the United States nor any other country would admit him.  

Mezei was born in Gibraltar and lived in the United States from 1923 to 1948. In May 1948, he sailed for Europe to visit his dying mother in Romania. He was denied entry in Romania and remained in Hungary for nineteen months. When he finally received an immigration visa from the United States Consul in Budapest, he went to France and boarded a ship bound for New York. He arrived at Ellis Island on February 9, 1950, and was temporarily excluded by an immigration inspector. On May 10, 1950, INS ordered Mezei's temporary exclusion to be made permanent, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

The Supreme Court held that the INS's exclusion of Mezei was lawful under the broad plenary power of the Executive Branch concerning immigration matters. The Court reasoned that the power to expel or exclude aliens, a fundamental sovereign attribute exercised by the Government's political departments, was largely immune from judicial control. Evidencing strong judicial deference, the Court noted, "[w]hatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and

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72 Id. at 207-08. The district court found respondent's detention unlawful and the court of appeals affirmed. Id. at 208-09.
73 Id. at 209.
74 Id. at 208.
75 Id.
76 Id.
77 Id.
78 Id.
79 Id.
80 Id. at 214. In deference to the Executive branch, the Court also held that the Attorney General need not disclose the evidence that lead to the decision that Mezei was a risk to national security. Id. at 215.
81 Id. at 210.
courts cannot substitute their judgment for the legislative mandate."\(^8\)

The Court articulated the rule that an alien within United States borders requires due process of law before deportation; however, an alien on the threshold of initial entry stands on a different footing.\(^8\) The Court described due process in terms of traditional standards of fairness. The Court also stated that a lawful resident alien may not "captiously" be deprived of his or her constitutional rights to procedural due process.\(^8\) Deportable aliens, such as those in *Wong Wing*\(^8\) and *Flores*\(^8\) receive substantive due process protection; whereas excludable aliens, such as *Knauff*\(^8\) and *Mezei*,\(^8\) receive minimal protection, and may be indefinitely detained by the INS.

### III. Statutory Immigration Law

Generally, aliens are indefinitely detained because the INS is unable to send them anywhere, or because the alien poses too great a threat to the public or a flight risk to be released under supervision. Before the federal statutory changes in 1996, a resident alien under a final deportation order was not allowed to be detained for more than six months.\(^8\) After the six month window closed, those aliens under deportation orders who had not been deported were released into the population under the supervision of the Attorney General.\(^9\)

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\(^8\) *Id.* at 216.

\(^8\) *Id.* at 212 (citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950)).

\(^8\) *Id.* at 213.

\(^8\) *Wong Wing v. United States*, 163 U.S. 228 (1896).


\(^8\) 8 U.S.C § 1252(c)(1994).

\(^9\) *Id.* § 1252(d).
After statutory changes in 1996, the INS must now detain excludable and criminally deportable aliens during their ninety-day removal period. And if the alien is not removed within the removal period of ninety days, the alien is subject to release into the population under the Attorney General's supervision. However, inadmissible and criminal aliens, who the Attorney General determines pose a threat to the community or a flight risk, "may" be detained beyond the removal period. The post-removal-period detention statute that authorizes the further detention or supervised release is subject to administrative review by the INS.

The INS District Director initially reviews an alien's record to decide whether further detention or release under supervision is warranted after the ninety-day removal period expires. If the Director decides to detain the alien, an INS panel will review the matter within three months. Based on records and a possible personal interview, the INS panel then decides between further detention or release under supervision. The INS panel, in making its decision, may consider an alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties. For the INS panel to authorize an alien's release, it must find that the alien does not pose a threat to the community, is not likely be violent, to flee if released, or to violate the conditions of release. Furthermore, the alien must demonstrate to the

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Attorney General's satisfaction that there is no danger or risk of flight.\textsuperscript{100} If the INS panel decides against release, it must review the matter again within a year, but may review it earlier if conditions change.\textsuperscript{101}

Congress changed the rules for deportation of aliens in 1996. The statutory changes reflect Congressional intent to no longer focus on a notion of entry, but rather focus on a notion of admission, to distinguish between classes of aliens.\textsuperscript{102} The distinction based on the notion of entry between deportable and excludable aliens was replaced by a distinction between those aliens who had lawfully entered the United States and those who had not.\textsuperscript{103}

IV. Indefinite Detention Challenged

A. Kestutis Zadvydas

Kestutis Zadvydas was born to Lithuanian parents in a displaced persons camp in Germany following World War II in 1948.\textsuperscript{104} He immigrated with his family to the United States when he was eight and became a resident alien.\textsuperscript{105} After living in the United States for several decades, Zadvydas was subject to removal from the United States because of his long criminal record.\textsuperscript{106} In 1977, INS found him "deportable," but Zadvydas was allowed to remain at large pending the resolution of his deportation case.\textsuperscript{107} Zadvydas failed to appear for his deportation hearing and

\begin{enumerate}
\item \textsuperscript{100} 8 C.F.R. § 241.4(d)(1) (2002).
\item \textsuperscript{101} 8 C.F.R. §§ 241.4(k)(2)(iii), (v) (2002).
\item \textsuperscript{103} See 8 U.S.C. § 1101(a)(13)(2002). Admission is the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." \textit{Id}.
\item \textsuperscript{104} Zadvydas v. Davis, 533 U.S. 678, 684 (2001).
\item \textsuperscript{105} \textit{Id}.
\item \textsuperscript{106} Zadvydas v. Caplinger, 986 F. Supp. 1011, 1014 (E.D. La. 1997).
\item \textsuperscript{107} \textit{Id}.
\end{enumerate}
was not heard from for ten years. In 1992, he was convicted for possessing cocaine with intent to distribute. After serving two years, he was released to the INS to undergo deportation proceedings again. An immigration judge ordered that Zadvydas remain in custody without bond based on the likelihood that Zadvydas would again fail to appear for future deportation hearings. On March 29, 1994, Zadvydas’s deportation hearing was held where he admitted all allegations and was again found deportable.

The INS ordered him to be deported to Germany, but Germany refused to accept him because he was not a German citizen. Lithuania and the Dominican Republic, Zadvydas’ wife’s country, were also un receptive. Thus Zadvydas, though classified “deportable,” was effectively undeportable. As a result, INS kept Zadvydas in custody after the ninety-day removal period ended. He filed a writ of habeas corpus challenging his continued detention beyond the statutory removal period. The federal district court granted the writ and ordered Zadvydas released under supervision on the grounds that indefinite detention violated Zadvydas’s substantive due process rights. The INS appealed and the Fifth Circuit Court of Appeals reversed the district court’s decision, finding that Zadvydas’s due process rights were not violated because deportation was not impossible, good faith

108 Id.
109 Id.
110 Id.
111 Id. The Board of Immigration Appeals (BIA) denied Zadvydas’s appeal. Id.
112 Id.
114 Id.
115 Id. at 684-85.
116 Id. at 685. See also Zadvydas v. Caplinger, 986 F. Supp. 1001, 1027-28 (E.D. La.1997) (shocking to the conscience that petitioner may be perpetually confined because he is not a citizen of any country).
attempts for removal were continuing, and petitioner’s detention was administratively reviewed periodically.\footnote{Zadvydas, 533 U.S. at 685 (citing Zadvydas v. Underwood, 185 F.3d 279, 294, 297 (5th Cir. 1999), vacated by 533 U.S. 678 (2001)).}

**B. Zadvydas v. Davis**

The Supreme Court granted certiorari and speaking for the five member majority,\footnote{Justice Breyer’s opinion was joined by Justices Stevens, O’Connor, Souter, and Ginsburg.} Justice Breyer characterized the issue before the Court as whether the post-removal-period statute authorized the Attorney General to detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien’s removal.\footnote{Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (emphasis in original).}

The Court vacated, or set aside, the case. The Court found that the Fifth Circuit’s standard of proof that deportation would be “impossible” was more than the Court’s reading of the statute could bear.\footnote{Id. at 702.}

The Supreme Court restricted the post-removal detention of an alien to a period reasonably necessary to effectuate removal, thereby avoiding a constitutional question concerning an alien’s due process rights.\footnote{Id. at 701-02. The Court stated, “the statute, read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.” Id. at 689.} The Court, nevertheless, raised the specter of constitutional doubt over the statute by warning that indefinite civil detention of an alien “would raise a serious constitutional problem.”\footnote{Id. at 690.}

While not denying the right of Congress to remove aliens, to condition their release from detention, or to incarcerate them where appropriate for violations of those conditions,\footnote{Id. at 694.} the Court...
found no clear Congressional intent to authorize indefinite detention of aliens.\textsuperscript{124} The Court noted that the statute provided that the Attorney General "may" detain removable aliens. According to the Court, while the word "may" did suggest discretion, it did not necessarily suggest unlimited discretion. Therefore the Court found that the word "may" was ambiguous. The Court explained, "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."\textsuperscript{125} To avoid a constitutional due process question that an indefinite detention would raise, the Court read an implicit limitation into the statute whereby detention was authorized only for a reasonable period, not an indefinite period.\textsuperscript{126} The Court noted that freedom from imprisonment and detention lay at the heart of the Fifth Amendment's protection from being deprived of liberty without due process of law.\textsuperscript{127}

The Court limited an alien's post-removal-detention to a period reasonably necessary to bring about the alien's removal.\textsuperscript{128} The Court announced that in the interest of uniform administration in the lower courts,\textsuperscript{129} a six-month post-removal-detention period\textsuperscript{130} was presumed to be a reasonable time limit.\textsuperscript{131} Acknowledging the plenary power of Congress in immigration matters, the Court stated that difficult questions might arise in assessing the leeway necessary for the political branches.\textsuperscript{132}

\begin{flushright}
\textsuperscript{124} Id. at 697. \\
\textsuperscript{125} Id. \\
\textsuperscript{126} Id. \\
\textsuperscript{127} Id. at 690 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). \\
\textsuperscript{128} Id. at 701. The Court held that in light of constitutional due process demands, the statute did not permit indefinite detention. Id. \\
\textsuperscript{129} Id. \\
\textsuperscript{130} Post-removal-period detention applies to certain categories of aliens who have been ordered removed, and includes those who violated immigration status, criminal or security concerns as well as considered a risk to the community or unlikely to comply with removal orders. Id. at 688. \\
\textsuperscript{131} Id. at 700-01. \\
\textsuperscript{132} Id. \\
\end{flushright}
Court sought to establish guidelines for future courts that would face such difficult questions. Therefore, the Court thought “it practically necessary to recognize some presumptively reasonable period of detention.”\textsuperscript{133}

After the ninety-day removal period, the Court presumed that a six-month detention would be reasonable.\textsuperscript{134} For detention to remain reasonable after six months, the INS would have to respond with evidence sufficient to rebut the alien’s showing that there is “no significant likelihood of removal in the reasonably foreseeable future.”\textsuperscript{135} The Court noted that every alien not removed would not necessarily be released after six months.\textsuperscript{136} An alien could be detained until it had been determined that there was “no significant likelihood of removal in the reasonably foreseeable future.”\textsuperscript{137}

Part I of Justice Anthony Kennedy’s dissent, joined by Chief William Justice Rehnquist and Justices Antonin Scalia and Clarence Thomas, charged the Court majority with disregarding clear congressional intent, writing its own statutory amendment, and dislocating the balance of powers.\textsuperscript{138} Justice Kennedy argued that the Court misunderstood the constitutional doubt rule it invoked in interpreting the statute. In the 1932 \textit{Crowell v. Benson} case, the Court articulated the constitutional doubt rule. The rule allows courts to choose from statutory interpretations that are “fairly possible” so as to avoid a constitutional question.\textsuperscript{139} Justice Kennedy declared that while the Court gave a brief bow to this constitutional doubt rule, it waltzed away from it by construing a

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\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.} at 701. Zadvydas was not removed because he was not a citizen of any country and no country had accepted him yet. \textit{Id.} at 684. Ma was not removed because the United States did not have a repatriation treaty with Cambodia at the present time. \textit{Id.} at 686.
\item \textsuperscript{136} \textit{Id.} at 701.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 705 (Kennedy, J., dissenting).
\item \textsuperscript{139} \textit{Crowell v. Benson}, 285 U.S. 22, 62 (1932).
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six-month period that not only bore no relation to the text of the statute, and even defeated the statutory intent and design.\textsuperscript{140}

Furthermore, Justice Kennedy announced that aliens, who through fair procedures were found to be flight risks, dangers to the community, or both, might ultimately be released into the general public.\textsuperscript{141} Justice Kennedy asserted that the Court’s six-month period, even with the sliding scale of reasonableness for potential repatriation negotiations, nullified the statutory purpose of protecting the community.\textsuperscript{142} According to Justice Kennedy, the authority to detain an alien beyond the removal period was in part predicated on an interest in protecting the community and this interest was not mitigated by the absence of a current repatriation treaty.\textsuperscript{143}

Justice Kennedy also pointed to some “potentially perverse results” from the Court’s ruling.\textsuperscript{144} Since convicted criminals are undesirable and other nations may refuse to admit them, these aliens may be released immediately under the majority’s rule because the likelihood of removal may be slimmest for them.\textsuperscript{145} By contrast, aliens who violate tourist visa requirements can in the typical case be held pending deportation on grounds that a minor offender is more likely to be removed.\textsuperscript{146}

\textsuperscript{140} Zadvydas, 533 U.S. 707 (Kennedy, J., dissenting).

\textsuperscript{141} Id. at 705 (Kennedy, J., dissenting).

\textsuperscript{142} Id. at 708 (Kennedy, J., dissenting).

\textsuperscript{143} See id. (Kennedy, J., dissenting).

\textsuperscript{144} Id. at 715 (Kennedy, J., dissenting).

\textsuperscript{145} Id. (Kennedy, J., dissenting). Justice Kennedy used as an example the case of Saroeut Ourk, a Cambodian alien determined to be removable and held pending deportation. See INS. v. Ourk, 533 U.S. 944 (2001). Ourk was convicted of rape by use of drugs in conjunction with the kidnaping of a 13-year-old girl; after serving 18 months of his prison term, he was released on parole but was returned to custody twice more for parole violations. Id. (Kennedy, J., dissenting). When he was ordered deported and transferred to the custody of the INS, it is no surprise the INS determined he was both a flight risk and a danger to the community. Id. (Kennedy, J., dissenting). Yet the Court of Appeals for the Ninth Circuit concluded that Ourk could no longer be held pending deportation, since removal to Cambodia was not reasonably foreseeable. Id. (Kennedy, J., dissenting).

\textsuperscript{146} Id. at 716 (Kennedy, J., dissenting).
In Part II of Justice Kennedy’s dissent, joined by Chief Justice Rehnquist, he posited that while the Judiciary was qualified to assess an alien’s flight risk or future dangerousness, assessing the status of repatriation negotiations epitomized the nonjusticiable inquiry. The status of repatriation treaties, insofar as they suggest a likelihood of deportation, is not amenable to judicial inquiry. To determine the status of repatriation treaties, the courts could be empowered to call Executive and Congressional officials to testify before it. Thus, causing what Justice Kennedy described as “systemic dislocations in the balance of powers.”

Justice Scalia’s dissent, with which Justice Thomas joined, characterized the issue as one involving a criminal alien under a final order of removal without any reasonably foreseeable prospects for deportation claiming a constitutional right of supervised release into the United States. Justice Scalia rejected a constitutional right of release into the United States by an individual who had no legal right to enter. For Justice Scalia, an alien under final order of removal is, constitutionally, in the same position as an inadmissible alien stopped at the border: both have no right to enter the United States.

V. Repercussions of the Supreme Court’s ruling in Zadvydas v. Davis

By reading out of whole-cloth a six-month limitation into the statute, the Zadvydas Court’s holding disturbed the

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147 Id. at 725 (Kennedy, J., dissenting).
148 See id. (Kennedy, J., dissenting).
149 Id. (Kennedy, J., dissenting).
150 Id. at 705 (Kennedy, J., dissenting).
151 Id. at 702-03 (Scalia, J., dissenting).
152 Id. (Scalia, J., dissenting).
153 Id. (Scalia, J., dissenting).
154 Part I of Justice Kennedy’s dissent characterized the six-month detention period as a judicially created statutory amendment. See id. at 705 (Kennedy, J., dissenting).
fundamental balance of powers between the branches of government.\footnote{155} Judicial deference to the plenary powers over immigration matters is a longstanding separation of powers concern. The Court disregarded its own counsel, past and present, concerning the requisite deference for immigration matters. The Court in \textit{Zadvydas} stated that ordinary principles of judicial review counsel the Judiciary to give expert agencies decision making leeway in matters that invoke their expertise.\footnote{156} In recognizing Executive branch primacy in foreign policy matters, the \textit{Zadvydas} Court cautioned the Judiciary to listen with care when the Government's foreign policy judgments, such as the status of repatriation negotiations, are at issue, and to grant appropriate leeway to the Government when its judgments rest upon foreign policy expertise.\footnote{157} In a long line of cases since the 1889 Chinese Exclusion Case,\footnote{158} the Court has deferred to the political branches to create immigration laws and procedures.

\textbf{A. Excludable Aliens Enjoy No Substantive Due Process}

The \textit{Zadvydas} Court steps out of line with these cases, and with grave consequences. Based on the Court's ruling, lower courts might conclude that excludable aliens enjoy no substantive due process rights at all. The Court distinguished between the lawful indefinite detention of Ignatz Mezei and the unlawful indefinite detention of Kestutis Zadvydas on the grounds that Mezei's return after an extended departure from the United States was treated, for constitutional purposes, as if he had been stopped at the border. The distinction is based on where an alien is standing in relation to the borders of the United States. The Court has noted that certain constitutional protections are afforded to persons inside the United States that are unavailable to aliens outside of the

\footnote{155} \textit{Id.} (Kennedy, J., dissenting).

\footnote{156} \textit{See id.} at 700.

\footnote{157} \textit{Id.}

\footnote{158} \textit{Chae Chan Ping v. United States}, 130 U.S. 581 (1889).
geographic borders. According to the Court, the territorial distinction between excludable and deportable aliens in *Mezei* "made all the difference."

In *Zadvydas*, the Court reiterated that while Fifth Amendment protections do not apply to aliens outside the United States, all persons within the United States are entitled to due process. An alien’s constitutional rights are hierarchically ordered based on territorial standing. Legal aliens have greater protections than deportable aliens and deportable aliens are given greater protections than excludable aliens. Aliens legally present in the United States enjoy greater constitutional rights than deportable aliens, or else a deportation hearing would be moot. According to the Court, a deportable alien’s substantive due process liberty interests were threatened by the Attorney General’s power of indefinite detention, thus reinforcing the idea that deportable aliens do enjoy substantive due process.

Deportable aliens also enjoy greater constitutional rights than excludable aliens. Deportable aliens have the right to be free from indefinite detention. Excludable aliens, who enjoy less constitutional protections, are not accorded this substantive right, or else they too would have to be released after the six-month post-removal period. By further entrenching the territorial standing rule, the Court may have effectively stripped excludable aliens of all due process rights.

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159 *Zadvydas*, 533 U.S. at 693 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990)).
160 *Id.*
161 *Id.*
163 Removable aliens do not have a right to "live at large" in the United States. See *Zadvydas*, 533 U.S. at 696.
164 See id. at 689-90.
165 See generally Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). This result is out of step with the Court’s previous cases. Even Justice Scalia’s dissent noted that excludable aliens had basic substantive due process rights whereby they cannot be tortured or beaten. See *Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting).
Deportable and excludable aliens are on unequal footing insofar as deportable aliens receive procedural and substantive due process, and excludable aliens receive at most only substantive due process. But once a deportable alien, protected by procedural due process, receives a fair hearing in front of an immigration judge and is adjudged “deportable,” there is no more procedure involved. A deportable alien awaiting deportation only benefits from substantive due process in so far as the alien cannot be indefinitely detained, tortured or sent to hard labor. Thus, a deportable alien in custody awaiting deportation only has substantive due process rights because the procedure, in the form of a deportation hearing, has already taken place.

Excludable aliens are stopped at the border and since they have not entered they are not protected by the due process clause. Although an alien may get off a boat at Ellis Island, the alien has not “affected an entry” for due process considerations. The Court has said repeatedly that only those within United States borders are protected by the Constitution. Excludable aliens on the other side of the border are not granted these protections because the reach of the due process clause cannot extend beyond United States sovereignty.

The question now raised by the Zadvydas decision is whether excludable aliens have no substantive due process rights. With no substantive due process rights, excludable aliens have no recourse against inhumane treatment during detention, much less recourse against indefinite detention. Such an unconscionable result is clearly out of line with prior case law which found that while the rights between the classes are not identical, excludable aliens have some substantive due process rights.

B. Excludable Aliens Enjoy Substantive Due Process, Therefore Must Be Released

Instead of focusing on territorial standing, the Court in Zadvydas could have relied on the most basic justification for

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166 See Wong Wing v. United States, 163 U.S. 228, 235 (1896).

167 See id.
detaining an alien for any length of time: aliens fundamentally do not have the same liberty interests that citizens do.\textsuperscript{168} Rather than adopting the traditional stance on immigration laws, the Court unintentionally may have denied a whole class of aliens any substantive protections while in INS detention. To avoid such an unconscionable result, lower courts may decide that both classes of aliens in custody waiting to be removed from the United States enjoy substantive due process rights. Once a court decides that some basic substantive due process rights exist, at a minimum that an alien may not be beaten or tortured while in INS custody, the court would have a difficult time trying to draw a bright-line that would distinguish between the rights deportable aliens enjoy. Namely, the substantive due process right that deportable aliens enjoy is the right to be free from detention, and that was the reason why the Court read an implicit limitation into the immigration statute. If courts decide that the two classes of aliens both enjoy the same substantive due process rights, and deportable aliens cannot be indefinitely detained, then excludable aliens similarly may not be indefinitely detained. A court could conclude that excludable aliens now must be released into the general population when they too have "no significant likelihood of removal in the reasonably foreseeable future."

Such a result is clearly not what Congress intended. For Congress to assert plenary power over immigration it must, at minimum, be able to determine who may or may not enter the United States. The Court’s reading of an implicit limitation into the statute is problematic because it is now unclear if the statute prevents indefinite detention of excludable aliens as well.\textsuperscript{169} Justice Kennedy argued in the dissent that the Court’s judicial amendment was overbroad because it was not explicitly limited to aliens who were once lawfully present in the United States, but could also apply to illegal and excludable aliens.\textsuperscript{170} The distinction the Court


\textsuperscript{169} See id. at 709-11 (Kennedy, J., dissenting).

\textsuperscript{170} Id. at 716 (Kennedy, J., dissenting). “The majority’s rule is not limited to aliens once lawfully admitted. Today’s result may well mandate the release of those aliens who first gained entry illegally or by fraud, and, indeed, is broad enough to require even that
makes between excludable and deportable aliens was not reflected in the statute. The statutory provision that provides for post-removal detention applies without distinction to both classes of aliens. This reinforces the argument that the Court ignored Congressional intent and created its own amendment. 171

The six-month limitation read into the statute by the Court now provides that any alien may be detained only until it has been determined that there is "no significant likelihood of removal in the reasonably foreseeable future." 172 Yet the Court provided no guidelines for performing this inquiry. With no way to operationalize or determine a "likelihood of removal," lower courts may shy away from this standard because it is vague and theoretically beyond the scope of the courts' purview.

Hauling political branch officials into the courts to testify on the status of repatriation negotiations fundamentally flies in the face of the deference the Court has traditionally shown to the co-equal branches of government. This fundamentally undercuts the horizontal separation of powers. The Court not only put an express limitation on the plenary power of Congress, but also overstepped the traditional bounds of the Judiciary and re-crafted a legislative document. 173

In 1999, the Court in INS v. Aguirre-Aguirre, instructed that when confronted with questions implicating an agency's construction of a statute, which the agency administers, courts should apply the principles of deference. 174 According to the Court, prin-

inadmissible and excludable aliens detained at the border be set free in our community." Id. (Kennedy, J., dissenting).

171 See id. at 712 (Kennedy, J., dissenting).

172 Id. at 699-700. However, the Court stated that the six-month presumption did not mean that every alien not removed must be released after six months. Id. But the Court has put the burden on the alien to provide good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. Id. at 701. The Court was troubled when aliens had the burden to prove they were no longer a danger, but now the Court requires that they provide a good reason to believe that they are not likely to be deported. See id. at 691-93.

173 See id. at 695. The Court found that Congress's plenary power was subject to "important constitutional limitations," and suggested that with appropriate sensitivity.

ciples of deference mean that courts should ask whether the statute was silent or ambiguous with respect to a specific issue, and if so, whether the agency’s answer was based on a permissible con-
stuction of the statute.175 These principles of deference are strikingly absent in the Zadvydas case.176 The statute was not silent on the question of post-removal detention, and the only ambiguity was created by the Court’s refusal to acknowledge that that Congress had given detention discretion to the Attorney General with the provision that he “may” detain.177

VI. Conclusion

Despite the Zadvydas Court’s avowed intent, lower courts are not given a better roadmap for future immigration cases. The scope and meaning of the “new” post-removal-detention statute is uncertain. The choice future lower courts must make is whether the Court put excludable aliens on an equal footing with removable aliens or whether excludable aliens now enjoy no substantive due process rights at all. In light of the deference traditionally shown in this area of law, the Court’s active reading of the statute is a marked shift from the usual standard of review.

According to Justice Kennedy, the Court assumed a role in foreign relations that was “unprecedented, unfortunate, and unwise.”178 Under the guise of helping lower courts and avoiding a

175 Id. at 424.
176 See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n. 21 (1976) (“[T]he authority to control immigration is not only vested solely in the Federal Government ... but also ... the power over aliens is of a political character and therefore subject only to narrow judicial review.”); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”).
177 See supra text accompanying notes 134-37.
178 Zadvydas, 533 U.S. at 718 (Kennedy, J., dissenting).
constitutional question, the Court caused far more confusion than had it merely examined the statute, found it unconstitutional, and allowed Congress to redraft the legislation. With the countenance of avoiding a constitutional question, the Court stepped on the toes of Congress. The Court went beyond interpreting the law.

With the semblance of avoiding a constitutional question, the Court redrafted the law. This fundamentally violates the separation of powers doctrine. Far from saving the statute by reading a limitation to avoid a constitutional problem, the Court’s ruling raises much graver concerns. The Court should have been more direct by simply striking down the statute if it was indeed unconstitutional. This would have provided a clearer understanding to whom, if anyone, indefinite detention might constitutionally apply. It would also have allowed Congress the opportunity to redraft the statute. In *Marbury v. Madison*, Chief Justice Marshall said it was the province and the duty of the Judiciary to “say what the law is,” not to re-draft the law or to amend it in ways contrary to Legislative intent.

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179 *See id.* at 705 (Kennedy, J., dissenting). According the Justice Kennedy, “[f]ar from avoiding a constitutional question, the Court’s ruling causes systemic dislocation in the balance of powers....” *Id.* (Kennedy, J., dissenting).


181 Justice Kennedy announced that the Court’s holding was a serious misconception of the proper role of the judiciary and the Court’s reading of the statute was not what Congress enacted. *Zadvydas*, 533 U.S. at 724-25 (Kennedy, J., dissenting).