COMMENTS

"YOU DON'T KNOW IF THEY'LL LET YOU OUT IN ONE DAY, ONE YEAR, OR TEN YEARS . . ." INDEFINITE DETENTION OF IMMIGRANTS AFTER *ZADVYDAS V. DAVIS*

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I. INTRODUCTION

> They just lock us up and throw away the key. It's like a people business for them. They don't care about us. They have beds here and it's like they're losing business unless they fill up the beds. So they just keep us locked down . . . I understand that I made a mistake, but I already did my time for that. Here I don't even know how much time I have to do. The law doesn't make any difference for us. It just doesn't make any sense.[1]

This is how Sergio Martinez characterizes indefinite detention. As of my interview with him on October 19, 2001, just weeks after the events of September 11th,[2] Mr. Martinez had al-

* J.D. Candidate, 2003, University of California Los Angeles. I would like to thank Sophan Pak, Vanna In, Tuan Nguyen and Sergio Martinez for their inspiring words of strength and resistance. I would also like to thank Shiu-Ming Cheer, Laura Gomez, and Devon Carbado for their helpful comments on a draft of this paper.

1. Interview with Sergio Martinez, Detainee, INS Service Processing Center, in San Pedro, Cal. (October 19, 2001) [hereinafter "Martinez interview"].

2. The events of September 11, 2001 included the hijacking of four commercial airliners for use as weapons of mass destruction. Within hours of the attacks, Americans of Muslim, Middle Eastern and South Asian descent were targeted for acts of hate and racial profiling. *See* Bill Ong Hing, *Vigilante Racism: The De-Americanization and Subordination of Immigrant America*, 7 MICH. J. RACE AND L. 441 (2002) (naming and giving historical context to the process of ostracism from the American community that Muslims, Middle Easterners and South Asians in the United States have endured in the wake of September 11th); *see also* Susan M. Akram and Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (arguing that the civil rights deprivations resulting from the "war on terrorism" may have long-term adverse impacts on the civil rights of citizens as well as noncitizens in the

ready been incarcerated at the Immigration and Naturalization Service Processing Center[3] in San Pedro, California, (hereinafter "San Pedro SPC"), for over ten months. An Afro-Cuban who arrived in the United States as part of the "Mariel Boatlift"[4] in 1980, Mr. Martinez moved to Fresno soon after his arrival. He has been in the United States since he was twenty-one years old. He is now forty-five.[5]

The voices of individuals like Mr. Martinez — individuals who currently face, or have formerly faced, indefinite detention — are central to this paper. I conducted four in-depth interviews with detainees at the San Pedro SPC approximately one month after the events of September 11th. All four interviews occurred during the week of October 12-19, 2001, and lasted from approximately thirty minutes[6] to two hours.[7] I conducted these inter-

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United States). Furthermore, various provisions in the U.S.A. Patriot Act, the Aviation and Transportation Security Act, and other "national security" and immigration measures (such as Operation Tarmac and others that focus on document fraud) have put all immigrant communities in a particularly vulnerable position post-September 11th.

3. INS detention facilities take various forms: Service Processing Centers , contract detention facilities, Federal Detention Centers, joint federal facilities with the Bureau of Prisons, and state and local jails. IMMIGRATION AND NATURALIZATION SERVICE, INS DETENTION FACILITIES, *at* http://www.ins.usdoj.gov/graphics/fieldoffices/detention/insdetention.htm.

4. In 1980, Fidel Castro allowed 125,000 Cubans to immigrate to the United States in an event that came to be known as the "Mariel Boatlift." The flood of immigrants included a substantial group of individuals who had been convicted of crimes in Cuba, as well as a significant number of individuals who were paroled (rather than legally admitted) into the United States and were later convicted of crimes on U.S. soil, thus rendering them inadmissible. The impact of this event is still being felt today, especially since many "Mariel Cubans" make up a large portion of the current "indefinite detainee" population. Kevin Costello, Comment, *Without a Country: Indefinite Detention as Constitutional Purgatory,* 3 U. PA. J. CONST. L. 507 (2001).

5. Martinez interview, *supra* note 1.

6. My interviews with Mr. Nguyen, Mr. Martinez and Mr. Pak each lasted between one-and-a-half and two hours. Mr. In's interview was unfortunately cut short after only thirty minutes because by the time the guards brought him down to the visiting room to meet with me, the San Pedro SPC's visiting hours were over and I had to leave the facility. I asked Mr. In if I could come back and visit him the following week to finish the interview. He jokingly told me he had to "check his schedule" and then said, "No really, since I'm stuck here anyway, I'm sure I can find some time to meet." Interestingly enough, when I returned the next week to finish the interview, Mr. In had been released.

7. All four individuals I interviewed had previously been incarcerated and served prison sentences — one in county jail, one in the California Youth Authority, and two in state penitentiaries — for a range of three-and-a-half months to seven years. None of the narratives in this paper will focus on or disclose the specific crimes for which the individuals were originally incarcerated and served time. I chose to exclude this information because, regardless of the specific crime, each of the individuals finished serving their time. Had they been United States citizens, they would have been released and long since returned to their families. But as noncitizens, they were taken into INS custody the moment they finished serving their sentences. As individuals born in Cambodia, Vietnam, and Cuba, they became "indefinite detainees."

views with Tuan Nguyen,[8] Vanna In[9] and Sergio Martinez[10] (who were detained at the San Pedro SPC)[11] and Sophan Pak[12] (who had recently been released).[13]

The four individuals I interviewed asked me to use their stories to educate others about what it was like to live as an indefinite detainee.[14] I see their stories as individualized acts of resistance.[15] Their voices not only inform the legal discussion of their plight, but also frame a telling moment that may have otherwise gone unnoticed. This moment begins in anticipation of June 22, 2001, the day the Supreme Court addressed the constitutional issues at stake for individuals facing indefinite detention,[16] and ends just days[17] before the U.S.A. Patriot Act[18] (hereinafter "Patriot Act") is passed on October 26, 2001. Given all the attention now focused on the Patriot Act, the history associated with this moment has been lost. Part of my aim is to recapture that history. The voices of Mr. Nguyen, Mr. In, Mr. Martinez and

8. Interview with Tuan Nguyen, Detainee, INS Service Processing Center, in San Pedro, Cal. (October 12, 2001) [hereinafter "Nguyen interview"].

9. Interview with Vanna In, Detainee, INS Service Processing Center, in San Pedro, Cal. (October 12, 2001) [hereinafter "In interview"].

10. Martinez interview, *supra* note 1.

11. The interviews I conducted at the San Pedro Service Processing Center all took place during the facility's visiting hours, on weekdays from 1-4 pm. I was fortunate to get the chance to interview Mr. Martinez in one of the two lawyer-client visitation rooms where we could speak face-to-face. My interviews with Mr. Nguyen and Mr. In took place in one of the family visitation booths. These are "no contact" rooms with a wall of glass between the detainee and his or her visitor. The rooms are particularly small and the only way to communicate is through a "phone" on the wall that rarely seems to work. That leaves the visitors (myself included) and detainees with little choice but to yell at each other through the glass when the "phone" is not working. As one can imagine, keeping such conversations confidential is particularly difficult with guards stationed right outside the booths. At 3:50 pm, I was promptly told visiting hours were over and I had to leave the building.

12. Interview with Sophan Pak, former Detainee, in Los Angeles, Cal. (October 13, 2001) [hereinafter "Pak interview"].

13. I met both Mr. Nguyen and Mr. Pak during client interviews as part of my summer internship with Catholic Legal Immigration Network [hereinafter "CLINIC"]. I spoke with each of them about my paper topic and both were eager to meet with me. Since Mr. Pak was released before our scheduled time to meet, he was the only individual I interviewed outside of detention.

14. Martinez interview, *supra* note 1; Nguyen interview, *supra* note 8; In interview, *supra* note 9; and Pak interview, *supra* note 12.

15. *See* Margaret E. Montoya, *Mascaras, Trenzas Y Greñas: Un/Masking The Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 214 (1994) (arguing that "[p]ersonal narratives . . . are more than stories. They are an important site of resistance" and that "[i]n the hands of Outsiders [members of groups who have been discriminated against historically], storytelling seeks to subvert the dominant ideology.").

16. Zadvydas v. Davis, 533 U.S. 678 (2001).

17. I interviewed all four individuals during the week of October 12-19, 2001. The Patriot Act was passed just days later on October 26, 2001.

18. Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (U.S.A. Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Mr. Pak provide a vehicle for doing so. Their stories, and the legal world within which they articulated them, can help us understand the legal and political ground upon which the Patriot Act was constructed.

During this pre-Patriot Act moment, three of the four individuals I interviewed were part of the nearly 3,800 people across the United States, including eight hundred in California alone, who were facing indefinite, or potentially permanent, incarceration under the custody of the Immigration and Naturalization Service (hereinafter "INS").[19] Former INS Commissioner Doris Meissner called the INS detention program "the fastest growing detention operation within the Department of Justice."[20] Of those caught up in this "detention operation," those facing potential indefinite incarceration were particularly vulnerable.

On June 28, 2001, in a 5-4 ruling by Justice Stephen Breyer, the Supreme Court decided *Zadvydas v. Davis* and the companion case *Ashcroft v. Kim Ho Ma,*[21] holding that after a noncitizen serves his or her prison term, the INS can detain the individual for only six months unless it can show that the noncitizen's native country is likely to take the individual back in the reasonably foreseeable future.[22] The Court explained that the Immigration and Nationality Act provision that allows removable "aliens"[23] to be detained beyond the ninety-day statutory removal period cannot be construed to allow indefinite detention because of the grave constitutional concerns such a construction would raise.[24] Although *Zadvydas* certainly did not "solve" the crisis of indefinite detention — thousands of other indefinite detainees remain incarcerated by the INS — the decision gave the Supreme Court an opportunity to address the constitutional issues at stake.

An accurate assessment of the work *Zadvydas* is doing for individuals facing indefinite detention goes beyond an under-

19. Henry Weinstein, *Imprisonment of Immigrants Has Limits, Justices Rule,* L.A. TIMES, June 29, 2001, at A27.

20. *INS Reform: Detention Issues: Hearing Before the Subcomm. on Immigration, Senate Comm. on the Judiciary*, 105th Cong. (1989) (testimony of former INS Commissioner Doris Meissner).

21. 533 U.S. 678 (2001) (consolidating Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) and Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), *vacated sub nom.* Ashcroft v. Kim Ho Ma, 533 U.S. 678 (2001)).

22. 533 U.S. at 699-700.

23. I use the word "alien" within quotation marks (despite the fact that the Court does not) here and throughout this paper. Although it is a legal term generally used throughout immigration law, the term is problematic because of the racist way in which it is regularly used by the INS and the media to dehumanize and criminalize noncitizens. For a discussion on how the term "alien" masks the privilege of citizenship and helps to justify the legal status quo, see, Kevin R. Johnson, *'Aliens' and the U.S. Immigration Laws: the Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997).

24. I discuss the *Zadvydas* decision in detail, *see infra* pp. 30-37.

standing of this or any other judicial decision. *Zadvydas* must also be placed within a context of both historical and continued resistance to indefinite detention. This resistance has made it impossible for the INS to hide the crisis of "indefinite detention." It also continues to inform the indefinite detainee community's response to the *Zadvydas* decision's possibilities and limitations.

The purpose of this paper is to explore the legal world of indefinite detention at one critical moment — the moment at which that world was impacted[25] by the *Zadvydas* decision. Part I looks at the legal world in which the pre-*Zadvydas* indefinite detention community was situated. It defines indefinite detention, identifies the communities affected at that time, and offers a history of resistance that informed the way in which indefinite detainees responded to *Zadvydas*. Part II analyzes the constitutional issues at stake in the decision and the Court's construction of the detention statute. Part III explores the INS response to the decision, with a particular focus on Attorney General John Ashcroft's July 19th Memorandum.[26] Part IV looks at how *Zadvydas* affected the lives of a group of individuals facing indefinite detention at the San Pedro SPC. I conclude Part IV with three specific recommendations for using this historical moment, post-*Zadvydas* and pre-Patriot Act, to advance the current struggle against indefinite detention: (1) continue to investigate the ways in which the INS is not meeting its burdens under *Zadvydas* and to hold it accountable;[27] (2) track and expose the changes taking place in the community of indefinite detainees post-*Zadvydas* and in the aftermath of September 11th; and (3) assist those communities — particularly Mariel Cubans — who have not yet reaped any of the benefits of the *Zadvydas* decision.

II. BACKGROUND

San Pedro SPC Deportation Officer Robert Naranjo stated, "We don't like to use the term 'indefinite' detainees. We prefer

25. This impact was experienced in different ways by members of the indefinite detention community. Those released post-*Zadvydas* faced the transition into life beyond incarceration. Those not released were forced to confront their potentially indefinite incarceration despite the so-called promise of *Zadvydas*.

26. 66 FR 38433. Memorandum from John Ashcroft, U.S. Attorney General, to the Acting INS Commissioner (unnamed) (July 19, 2001) [hereinafter "Ashcroft Memorandum"].

27. Holding the INS accountable will be a particularly challenging task. Under the recently passed Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, the INS will soon cease to exist (tit. IV, subtit. F, sec. 471) and the detention and removal program will soon be transferred from the INS Commissioner to the newly created Under Secretary for Border and Transportation Security (tit. IV, subtit. D, sec. 441). Nevertheless, because the detention and removal program remains a responsibility of the INS at this time, I use the "INS" as the institution that must be held accountable.

the term 'long-term.'"[28] This deportation officer's euphemistic terminology certainly does not change the reality these individuals face: "indefinite, perhaps permanent, detention."[29] Andrea Siemens, advocate with the Capital Area Immigrants Rights Coalition, explains: "nobody deserves to be locked up indefinitely. If they had just a criminal sentence, they'd know when they were getting out, but these people ha[ve] no idea when they are getting released, and that [i]s taking a psychological toll on them."[30] This "psychological toll" is completely independent of the particular crime for which the individual was originally incarcerated. Mr. Martinez explains this struggle most clearly:

> You sit here. You sit here and it starts to affect your brain. It makes you feel like maybe your brain is lost. It's like you don't know anything after a while — you don't know if they'll let you out in one day, one year, or ten years. In the pen, at least you know when you're getting out — you have the information. Your brain can work like it's supposed to. But here, it's like you lose your brain.[31]

Prior to September 11th, most individuals in the indefinite detention community arrived at this uncertain state through a similar path. First, they served their criminal sentences. Second, upon release, the INS immediately took them into custody. Third, an Immigration Judge ordered them removed from the United States under the Illegal Immigrant Responsibility and Immigration Reform Act of 1996 (hereinafter "IIRIRA") because of the conviction.[32] Fourth, unable to show that they are neither

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28. Interview with Deportation Officer Robert Naranjo, INS Service Processing Center, in San Pedro, Cal. (October 12, 2001) [hereinafter "Naranjo interview"]. Officer Naranjo is one of four deportation officers at the San Pedro SPC. Each deportation officer is responsible for approximately 250 detainees at any one time.

29. Zadvydas v. Davis, 533 U.S. at 699 (Breyer, J., writing for the majority).

30. Cheryl W. Thompson, *INS to Free 3,400 Convicts; Ruling Forces Release of Unwanted Foreign Nationals,* THE WASHINGTON POST, July 20, 2001, at A2.

31. Martinez interview, *supra* note 1. Mr. Martinez' struggle to survive indefinite detention and the way in which the *Zadvydas* decision affected that struggle is critical to the focus of this paper. The specific crime for which he or any other individual facing indefinite detention was originally convicted is outside the scope of this paper. *See, supra* note 7.

32. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.). IIRIRA mandates detention of certain criminal "aliens" during the removal periods and for the subsequent ninety-day removal period. It also adds the post-removal-period provision at issue in *Zadvydas*. Since IIRIRA is silent on the length of time the INS may hold a convicted "alien," the INS therefore maintained, pre-*Zadvydas*, that it had the authority to detain such noncitizens for an unlimited amount of time. Another 1996 immigration law, the Antiterrorism and Effective Death Penalty Act of 1996, played a role in some detainees ending up in the "indefinite detention" population as well. *See* 100 Stat. 1277 (439(c) expands the grounds noncitizens subject to mandatory detention). Bruce Zagaris, *U.S. Will Free Convicted Aliens and Threatens Countries Refusing to Accept Their Return*, 17 No. 9 MIGRATION ENFORCEMENT AND INTERNATIONAL HUMAN RIGHTS (2001).

a threat to the community nor a flight risk, they ended up being detained indefinitely.[33]

The community facing indefinite detention prior to September 11th was made up of individuals who were born in countries which fall into two general categories: (1) countries that do not have repatriation agreements with the United States[34] or (2) countries whose governments no longer exist, refuse to accept certain individuals, or are notoriously slow to produce travel documents.[35] INS deportation officers characterized the countries in the first category as "the big four"[36] — Cambodia[37], Laos, Vietnam and Cuba. Far more countries — such as Haiti,[38] Jamaica,[39] China,[40] Jordan,[41] and various countries that were part of the former Soviet Union[42] — fall into the second category.

Individuals facing indefinite detention have also been categorized in another way for purposes of legal analysis. One group of individuals facing indefinite detention consists of former legal permanent residents who are deemed "removable" because of crimes they committed while present in the United States. A second group is deemed "inadmissible"[43] because they were never

33. The INS detains noncitizens who have been ordered removed under 8 U.S.C. § 1231. For a more in-depth discussion, see M. Gavan Montague, *Should Aliens Be Indefinitely Detained Under 8 U.S.C. section 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439 (2001).

34. For reasons why these countries do not have repatriation agreements with the United States, see discussion *infra* Part II. *See* discussion *infra* at pp. 33-35 and notes 129-130.

35. Lourdes M. Guiribitey, *Criminal Aliens Facing Indefinite Detention Under INS: An Analysis of the Review Process*, 55 U. MIAMI L. REV. 275, 275 (2001).

36. Naranjo interview, *supra* note 28.

37. Cambodia no longer fits into the "countries without repatriation agreements with the United States" category. Cambodia signed a repatriation agreement with the United States in March 2002. Between March 2002 and the end of December 2002, the INS deported thirty-six Cambodian nationals and targeted an additional 1,400. Bill Ong Hing, *Deported for Shoplifting?,* WASHINGTON POST, Dec. 29, 2002, at B7 [heirenafter Hing, *"Deported for Shoplifting?"*].

38. Telephone interview with Laurie Joyce, Deputy Director of Special Projects, CLINIC (Oct. 30, 2001) [hereinafter "Joyce interview"]. Ms. Joyce has been working on an indefinite detention monitoring project since December 2000.

39. Zagaris, *supra* note 32.

40. *See* Wei Zhou v. Farquharson, 2001 U.S. Dist. LEXIS 18239, No. 01-11391 (D. Mass. Oct. 19, 2001). In Part III, I discuss how three U.S. district courts have interpreted the "travel documents are imminent" loophole in *Zadvydas*. *See infra* pp. 23-25 and notes 141, 145, and 150.

41. Caryl Clarke, *U.S. Urges Nations to Take Deportees: The Pressure Might Get Some Immigrants Out of York County Prison*, YORK DAILY REC., Aug. 25, 2001, at A1. (describing the plight of a woman who was born in Jordan, but who left with her family before her first birthday). The Jordanian woman was held by the INS for six years. The Jordanian embassy issued travel orders for her in 1998, but the INS never deported her. As of the fall of 2001, Jordan refused to accept her and she remained in INS custody. *Id.*

42. Weinstein, *supra* note 19.

43. Before the enactment of IIRIRA, this group of noncitizens was officially referred to as "excludable aliens." Since the enactment of IIRIRA, this group has

legally admitted to the United States, although they were physically present here. Such individuals were released into the United States pending procedural measures aimed at removing them. Thus, while these individuals are actually physically present in the United States, legally they are considered detained at the border.[44] The largest group of "inadmissible aliens" facing indefinite detention include individuals, like Mr. Martinez, who arrived in the United States as part of the Mariel Boatlift and who were later convicted of crimes in this country.[45]

The distinction between indefinite detainees who are deemed "removable" — former legal permanent residents — and those deemed "inadmissible" — mostly Mariel Cubans considered "stopped at the border" — is critical. The protections in *Zadvydas*, according to the Attorney General and most federal district courts hearing cases involving indefinite detainees post-*Zadvydas*, only apply to individuals deemed "removable"; in other words, they only apply to those detainees who previously enjoyed legal resident status.[46]

Despite these differences in INS classifications, I found evidence that individuals across national origin groups have historically resisted indefinite detention. At the San Pedro SPC, much of the resistance has come from the Southeast Asian detainees. All of the Asian men at the San Pedro SPC, including the Cambodian, Laotian and Vietnamese individuals facing indefinite detention, live in "pod 3."[47] Thus, information sharing is easier for them than it is for most of the Cubans at the San Pedro SPC, as the number of Cubans is smaller and they are spread throughout the three "pods" of Latinos.[48]

Individualized acts of resistance from individuals in "pod 3" is a daily reality. Former indefinite detainee Sophan Pak, for in-

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been referred to as "inadmissible." *See* 8 U.S.C. 1182 (1999); Costello, *supra* note 4, at 539 n. 35.

44. Costello, *supra* note 4, at 539 n. 36.

45. *See id.* at 507.

46. In Part IV, I take issue with this position. *See infra* pp. 30-32. In this section I also discuss how future litigation that addresses the plight of thousands of Mariels facing indefinite detention is currently in the planning stages.

47. The term "pod" to describe each of the segregated living areas within the San Pedro SPC seems to be an extension of the racist "alien" theme.

48. Interview with Shiu-Ming Cheer, Attorney and Immigrants Rights Advocate, CLINIC, in Los Angeles, Cal. (Oct. 26, 2001) [hereinafter "Cheer interview"]. At the time of this interview, Ms. Cheer was one of only two attorneys who consistently provided free legal services to the nearly 800 individuals detained at the San Pedro SPC at any given time. Ms. Cheer had interacted with close to forty individuals facing indefinite detention. She worked directly on ten such cases and met approximately thirty individuals facing indefinite detention through the rights presentations she regularly conducted at the San Pedro detention center. Ms. Cheer now works for the Florence Immigrant and Refugee Rights Project in Florence, Arizona, representing children and youth detained by the INS.

stance, regularly asserted his rights to resist both the guards and his status as an indefinite detainee:

> Not everyone stands up to the guards, but some of us do. Especially people like me who know that being in jail for immigration is different than prison. I know that I should speak up because like they always tell us, I'm an "administrative detainee" and not a prisoner. Here the guards don't have the kind of power they have in prison. The guards can't keep us in here the way they can when you're in prison. I always keep that in mind.
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> One day I was walking to make a phone call and I felt someone staring at me. I turned around to see what the problem was and I saw two guards. I didn't know why they were staring at me. One of them told me to come over to where they were and turn around. I did what he said and then for no reason he cuffed me. Then he told me to get on my knees. He already had me cuffed, so I told him no. I told him I wanted to talk to his supervisor. He just put me in seg.[49] But at least I stood up for myself before they took me to seg.
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> I also ended up in seg on September 11th. Right after the planes crashed the guards came in and shut off the TV. I told them I had family in Philadelphia and I needed to see what was going on. I told the guards that we weren't terrorists and that we all had the right to see what was happening. The guard said the decision came from the head guy at INS and he was just following orders. I told him I wanted to talk to his supervisor. He was mad but he finally sent for his supervisor since lots of us started saying we wanted to watch TV. When the supervisor showed up, he said he had no power to ignore what the head INS guy told him, so the TV was going to stay off. I repeated that we were not terrorists and had a right to see what was happening in New York and Philadelphia. I said we wanted to see the head INS guy. He just said I was starting trouble and took me down to seg.[50]

This type of resistance — at either the individualized or group level — comes at great risk. For Mr. Pak, a stay in the segregation unit usually followed his individualized acts of resistance. For Mr. Ma, his planned participation in a hunger strike[51] to pro-

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49. "Seg" is short for the segregation unit at the San Pedro SPC.

50. Pak interview, *supra* note 12. Mr. Pak has spent time in three different SPCs: two in California — San Pedro and El Centro — and one in Arizona — Florence. According to Mr. Pak, the San Pedro SPC's food, facilities, and guards were by far the worst. He explains that in Arizona, the INS deportation officers would give people information about their cases, letters of recommendation to support their custody reviews, and in general do things to help them get out. But he said that he had almost no communication — and certainly no helpful communication — with his deportation officer at the San Pedro SPC.

51. For more details regarding this hunger strike and Kim Ho Ma's related resistance struggles, see his personal statement *at* http://www.apiforce.org/SEADEP/Kimho_Ma.statement.htm.

test indefinite detention was named as one reason the INS was "unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release."[52] In other words, the INS used Mr. Ma's involvement in resistance efforts[53] to justify his continued incarceration.

This type of resistance is somewhat harder for many Cuban detainees at the San Pedro SPC because their numbers are smaller and they are far more isolated. However, organized resistance has historically been particularly strong within the community of Cubans detained by the INS in Florida. There the "Mothers for Freedom" hunger strike pressured the INS to implement procedures for a fair review of cases involving individuals facing indefinite detention. Four mothers of Cuban detainees went on a forty-seven day[54] hunger strike in front of Krome Service Processing Center in Miami, Florida.[55] The striking parents were asking the INS and the Florida District Director for a fair process of review of their sons' cases and those of thousands of other indefinite detainees.

The persistence of the strikers provoked the visit of former INS Commissioner Doris Meissner to Miami. On April 30, 1999, the Commissioner Meissner notified the public that all INS District Offices had been instructed to perform reviews of individuals who had final orders of removal but whose immediate repatriation was not possible. She further explained that the INS would put into place "uniform, standardized and transparent procedures for the reviews."[56] The hunger strike led to the immediate release of four sons of the original strikers, and the eventual release of all five.

Thus, the history of resistance to indefinite detention by detainees and their families is crucial to understanding why it has been virtually impossible for the INS to hide the crisis of indefinite detention. It continues to inform the way in which the indef-

52. Zadvydas v. Davis, 533 U.S. 678, 685-86 (2001).

53. Resistance efforts in the Southeast Asian community have been extremely strong since the repatriation agreement went into effect in March 2002. The Southeast Asian Freedom Network (SEAFN) is a national campaign to stop the deportations of Cambodian nationals. A sample of participating organizations include: CAAAV: Organizing Asian Communities (Bronx, NY), PrYSM (Providence, Rhode Island), Asian Freedom (Madison, WI), Family Unity (Lowell, MA), HOPE Project (Long Beach, CA), Khmer Girls in Action (Los Angeles, CA), Asian Americans United & Greater Cambodian Association (Philadelphia, PA), Asians & Pacific Islanders for Community Empowerment (Bay Area, CA), and the Cambodian American Consortium (Central Valley, CA). For information on how communities and grassroots organizations around the country have been mobilizing, *see* http://www.apiforce.org/SEADEP/SEADep.htm#SEAFN (last visited on February 26, 2003).

54. The hunger strike began on March 18, 1999 and lasted until May 3, 1999.

55. Guiribitey, *supra* note 35, at 279-281.

56. *Id.* at 280.

inite detention community sees both the possibilities and limitations of the *Zadvydas* decision.

III. THE *ZADVYDAS* DECISION

In this section, I begin with an explanation of the facts, reasoning and holding of *Zadvydas v. Underdown*[57] and *Ashcroft v. Kim Ho Ma*,[58] the two cases the Supreme Court consolidated for oral argument and decided jointly in *Zadvydas*.[59] I then examine the way in which the Court used the Fifth and Ninth Circuit standards to stake out a middle ground. I then address constitutional concerns and analyze the Court's construction of 8 U.S.C. § 1231(a)(6). I conclude Part II with a discussion of the Court's "reasonably foreseeable removal" standard.

In *Zadvydas*, Justice Breyer wrote the 5-4 decision that resolved a split between the Fifth and Ninth Circuits.[60] The Fifth Circuit case, *Zadvydas v. Underdown*, involved a legal permanent resident that was born in 1948 of Lithuanian parents in a displaced persons camp in Germany. When he was eight years old, Mr. Zadvydas immigrated to the United States with his parents and he has lived here ever since. After serving two years in prison, the INS took him into custody. He was ordered deported in 1994, but no country with which he had ties was willing to accept him. The INS kept him in custody after the expiration of the ninety-day removal period. In September 1995, Mr. Zadvydas filed a writ of habeas corpus.[61] In October 1997, a Federal District Court granted that writ and ordered him released under supervision.[62] According to the district court, the Government would never succeed in its efforts to remove Mr. Zadvydas from the United States, leading to his permanent (or indefinite) confinement, in violation of the Constitution. The Fifth Circuit reversed the decision, and in doing so denied Mr. Zadvydas' release.[63] It concluded that Mr. Zadvydas' detention did not violate the Constitution because eventual deportation was not "impossible," since "good faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review."[64]

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57. 185 F.3d 279 (5th Cir. 1999).

58. Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), *vacated sub nom.* Ashcroft v. Kim Ho Ma, 533 U.S. 678 (2001).

59. Zadvydas v. Davis, 533 U.S. 678 (2001).

60. *Id.*

61. The writ was filed under 28 U.S.C. § 2241.

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

63. Zadvydas v. Underdown, 185 F.3d at 294, 297.

64. *Id.* 8 C.F.R. § 241.4 (2001) contains specific regulations for post-removal review procedures, including what the Fifth Circuit referred to as "periodic administrative review." *See also Zadvydas*, 533 U.S. at 692.

The Ninth Circuit case, *Kim Ho Ma v. Reno*, involved a former legal permanent resident that was born in Cambodia in 1977. When he was two-years old, his family fled to refugee camps in Thailand and the Philippines. They eventually arrived in the United States, where Kim Ho Ma lived as a legal permanent resident since the age of seven. In 1995, at the age of seventeen and after serving two years in prison, Mr. Ma was released into INS custody. He was ordered removed because of his aggravated felony conviction.[65] The INS kept him in custody after the expiration of the ninety-day removal period because, "in light of his former gang membership, the nature of his crime, and his planned participation in a prison hunger strike, it was 'unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release.'"[66] In 1999, Ma filed a petition for a writ of habeas corpus. The district court held that there was no "realistic chance" that Cambodia would accept him and ordered his release.[67] The Ninth Circuit affirmed Mr. Ma's release, concluding that the statute did not authorize detention for more than a "reasonable time" beyond the ninety-day period authorized for removal.[68] The Ninth Circuit held that given the lack of a repatriation agreement with Cambodia, the "reasonable time" expired upon passage of the ninety-day period.[69]

In both *Zadvydas* and *Ma*, the noncitizens were ordered removed after having been admitted to the United States. INS authorities could not locate a country willing to receive the deportable "aliens," so they were detained indefinitely. Both filed writs of habeas corpus under 28 U.S.C. § 2241, which the Court held was proper for jurisdictional purposes.[70]

In assessing the standards of the two Circuits, the Supreme Court staked out a middle ground, suggesting that the Fifth Circuit standard was too strict and the Ninth Circuit standard was too lenient. The Fifth Circuit held that Mr. Zadvydas' continued detention was lawful as long as "good faith efforts to effectuate

65. *See* 8 U.S.C. § 1101(a)(43)(F) (defining certain violent crimes as aggravated felonies).

66. *Zadvydas*, 533 U.S. at 685-86. It is interesting to note that Ma's involvement in a resistance movement contributed to the INS' assessment that he would abide by his conditions of release. For more information on Ma's personal story, see *supra* note 51 and Lisa Cox, *The Legal Limbo of Indefinite Detention: How Long Can You Go?*, 50 AM. U. L. REV. 725, 728-730 (2001).

67. Despite the fact that the district court had ordered Ma released and the Ninth Circuit affirmed, Ma, along with nine other Cambodian nationals, was deported to Cambodia and landed in Phnom Penh on October 2, 2002. CAMPAIGN AGAINST SOUTHEAST ASIAN DEPORTATION (SEADEP), *at* http://www.apiforce.org/SEADEP/SEADep.htm#SEAFN (last visited on February 26, 2003).

68. Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).

69. *Id.* at 830-831.

70. *Zadvydas*, 533 U.S. at 688.

. . . deportation continue" and Mr. Zadvydas failed to show that deportation would prove "impossible."[71] The Court assessed this standard by stating: "[T]his standard would seem to require an alien seeking release to show the absence of *any* prospect of removal — no matter how unlikely or unforeseeable — which demands more than our reading of the statute can bear."[72]

The Ninth Circuit held that the Government was required to release Mr. Ma from detention because there was no reasonable likelihood of his removal in the foreseeable future.[73] The Court assessed this standard in the following way: "[I]ts conclusion may have rested solely upon the 'absence' of an 'extant or pending' repatriation agreement without giving due weight to the likelihood of successful future negotiations."[74] The Court vacated the decisions and remanded both cases for further proceedings consistent with *Zadvydas*.

The central issue in *Zadvydas* was whether 8 U.S.C. § 1231(a)(6), the statute providing that the government "may" detain a removable "alien" beyond the ninety-day statutory removal period, authorized the Attorney General, in his or her sole discretion, "to detain a removable alien *indefinitely* beyond the [ninety day] removal period" or only for a period *reasonably necessary* to secure the noncitizen's removal.[75] The Court construed the statute to contain an implicit "reasonable time" limitation of six months, the application of which was subject to federal court review.[76]

A. *Constitutional Concerns*

The government argued that the statute should be read literally and that because it sets no limit on the length of time a noncitizen may be detained beyond the removal period, there is none. Furthermore, the government argued that "whether to continue to detain such an alien and, if so in what circumstances and for how long" is up to the Attorney General, not the courts.[77]

The Court responded that federal statutes should be construed, if possible, to avoid an interpretation that would cast serious doubt on their constitutionality. The Court went on to elaborate on the Fifth Amendment's Due Process rights of all "persons" — including those persons like Mr. Zadvydas and Mr.

71. *Zadvydas*, 185 F.3d at 294, 297.
72. *Zadvydas*, 533 U.S. at 702 (emphasis in original).
73. *Kim Ho Ma*, 208 F.3d at 831 n. 30.
74. *Zadvydas*, 533 U.S. at 702.
75. *Id.* at 682 (emphasis in original).
76. *Id.* at 700-01.
77. *Id.* at 689.

Ma who had already been ordered deported and were being held in detention.

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that Clause protects.[78]

The Court explained "that government detention violates the Due Process Clause unless it is ordered in a *criminal* proceeding with adequate procedural protections, or in certain special and 'narrow' non-punitive 'circumstances'."[79] Since the proceedings at issue here were civil,[80] not criminal, the Court assumed they were nonpunitive. Thus, the Court concluded that "[t]here is no sufficiently strong special justification here for indefinite civil detention."[81]

The Government argued that the statute had two regulatory goals: (1) "ensuring the appearance of aliens at future immigration proceedings" and (2) "[p]reventing danger to the community."[82] The Court rejected the first justification — preventing flight — as "weak or nonexistent where removal seems a remote possibility at best."[83] The Court qualified the second justification — protecting the community — by demanding what might be termed a "dangerous plus special circumstances" standard. The Court explained that a vague notion of general "dangerousness" did not justify continued detention past the ninety-day removal period. "In cases in which preventive detention is of potentially indefinite duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger."[84] The Court presented three main reasons for this heightened

78. *Id.* at 690 (alteration in original) (citation omitted). *See also* Victoria Cook Capitaine, Note, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants In the United States*, 79 TEX. L. REV. 769, 789 n.4 (2001) (noting that the Fifth Circuit succinctly pointed out, "aliens are not non-persons." in Lynch v. Cannatella, 810 F.2d 1363, 1375 (5th Cir. 1987). The Supreme Court has further explained, "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210 (1982)).

79. *Zadvydas*, 533 U.S. at 690 (emphasis in original) (citations omitted).

80. For a useful discussion of the legal fiction involved in describing INS detention as "civil" or "administrative," see Cox, *supra* note 66, at 726 n. 6.

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

82. *Id.*

83. *Id.*

84. *Id.* at 691 (emphasis in original) (citations omitted).

"dangerousness plus special circumstance"[85] standard: (1) the potentially permanent aspect of civil confinement, (2) the way in which the statute authorizes detention for such a broad spectrum of noncitizens, and (3) the weak procedural protections available to noncitizens facing indefinite detention.

First, the Court explained that the "civil confinement here at issue is not limited, but potentially permanent."[86] Second, the Court addressed the statute's over-inclusiveness: "The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' but broadly to aliens ordered removed for many and various reasons, including tourist visa violations."[87] Finally, the Court shifted its focus to procedural issues. The Court stated:

> [T]he sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant later judicial review . . . . This Court has suggested, however, that the Constitution may well preclude granting "an administrative body the unreviewable authority to make determinations implicating fundamental rights."[88]

The Court concluded that "[t]he serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious."[89]

The Court then made a larger point that went beyond any specific set of procedures guaranteed to the indefinite detainee population. The Court stated: "[W]e believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent."[90]

The final constitutional issue the Court addressed was in response to the Government's argument that given Congress' "plenary power" to create immigration law, the judicial branch must defer to executive and legislative branch decision-making in that area.[91] The Court acknowledged this Congressional power but

85. Hereinafter the "dangerousness plus special circumstance" standard will be referred to as "dangerousness plus."

86. *Zadvydas*, 533 U.S. at 691.

87. *Id.* (citation omitted).

88. *Id.* at 692 (citations omitted).

89. *Id.*

90. *Id.* at 696 (internal citation omitted).

91. For a helpful discussion of the historical role the plenary power doctrine has played in immigration law, as well as an argument that the plenary power doctrine is now outdated, see Capitaine, *supra* note 78, at 769.

responded that this "power is subject to important constitutional limitations."[92]

The Government presented two arguments in support of the Attorney General's claim of unfettered discretion under the post-removal period detention statute: (1) the statute's use of the word "may" and (2) the statute's history. First, the Court responded to the Government's assertion that "may," as used in 8 U.S.C. 1231(a)(6), which provides that the Government "may" detain a removable "alien" beyond the ninety-day statutory removal period, suggests discretion. The Court stated that "while 'may' suggested discretion, it does not necessarily suggest unlimited discretion."[93] The Court found the word "may" to be "ambiguous" and stated that "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."[94]

Second, the Court explored the statute's history. In doing so, the court "found nothing in the history . . . that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention."[95] Interpreting the statute to avoid a serious constitutional threat, the Court concluded that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[96]

The Court set up the "reasonably foreseeable removal" standard to help federal habeas courts faced with these types of cases. "The habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal . . . It should measure reasonableness . . . assuring the alien's presence at the moment of removal."[97] *If removal is reasonably foreseeable*, the habeas court should consider the risk of the noncitizen committing further crimes as a factor potentially justifying confinement within that reasonable removal period. Thus, dangerousness[98] is only a factor when removal is reasonably foreseeable. *If the removal is not reasonably foreseeable*, the court should hold continued detention unreasonable and no longer authorized by statute.[99] At this point, the habeas court should set the noncitizen free under conditions of supervised released.

92. *Zadvydas*, 533 U.S. at 695 (citations omitted).
93. *Id.* at 697.
94. *Id.*
95. *Id.* at 699.
96. *Id.*
97. *Id.*
98. See discussion of "dangerousness plus" standard *supra* at p. 26 and note 85.
99. *Zadvydas*, 533 U.S. at 699-700 (emphasis added).

The Court stated that practicality was the motivation for judicial recognition of a presumptively reasonable detention period. The Court recognized that Congress probably did not expect that every single removal could take place within ninety days. At the same time, the Court stated that Congress previously doubted the constitutionality of detention for more than six months.[100] For the sake of uniform administration in the federal courts, the majority then decided that six months would be the appropriate and "presumptively reasonable" period.

After establishing this six-month period as "presumptively reasonable," the Court addressed how the burden shifts from the detainee to the Government once the detention has passed the six-month mark. The Court stated: "After this six-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."[101] The Court then spelled out what it meant for the detention to remain reasonable. The Court explained that "[F]or detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."[102]

The Court concluded with a final qualification that "[t]his six-month presumption . . . does not mean that every alien not removed must be released after six months . . . To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[103] For individuals from countries which, at the time *Zadvydas* was decided, did not have repatriation agreements with the United States — namely Cambodia, Vietnam, Laos and Cuba — this qualification was not particularly troublesome. Soon after *Zadvydas* was decided, the INS began releasing significant numbers of people from these countries because it was almost impossible to show that removal was "reasonably foreseeable" when the United States had no repatriation agreement with a particular country.[104] However, for individuals from countries with repatriation agreements — countries that were either notoriously slow at producing travel documents or for whatever reason were not interested in allowing a particular individual to repatriate — this qualification was, and continues to

100. *Id.* at 701 (citation omitted).
101. *Id.*
102. *Id.*
103. *Id.*
104. Joyce interview, *supra* note 38. *See also* CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (CLINIC), INS DETENTION POST-ZADVYDAS V. DAVIS: JULY 2001–JAN. 2002 (unpublished manuscript) (on file with author).

be, very troublesome. It allowed the INS to claim that since "travel documents are imminent" (in other words, removal is "reasonably foreseeable") they are justified in continuing to incarcerate the individual.[105]

Thus, in *Zadvydas* the Supreme Court resolved the Fifth and Ninth Circuit split by staking out what they viewed as a middle ground between the two Circuit standards. The Court construed 8 U.S.C. § 1231(a)(6) to contain an implicit, six-month "reasonable time" limit for individuals potentially facing indefinite detention. However, many failed to benefit from this limitation because of the Court's qualification that the six-month limit did not apply to those whose removal was "reasonably foreseeable."[106]

IV. INS RESPONSE TO THE *ZADVYDAS* DECISION

> After the Supreme Court case happened they sent a deportation officer to meet with all of us Asians. He came into the pod and said they might release us, but he didn't know when. I don't think he knew very much. He wasn't trying to give us information about our rights or anything. They just sent him to talk to us because they know we watch TV and we know what's going on. They just didn't want any trouble from us. That's the only reason they sent him into the pod.[107]

Here, Mr. Nguyen explains the way in which the INS failed to provide the detainees with accurate information regarding how *Zadvydas* might impact their particular situations. Mr. Nguyen also identifies what he views as the INS's real motivation for even approaching the subject, to try to prevent or squash any type of resistance or organized response.[108]

Shifting from the indefinite detainee perspective of how the INS responded to the *Zadvydas* decision, we move now to the deportation officer perspective. According to San Pedro SPC Deportation Officer Robert Naranjo, "As far as we're concerned the Supreme Court decision didn't change anything. We were already doing everything the Supreme Court said."[109] Attorney General John Ashcroft, however, did not seem to share Officer Naranjo's assessment. The Attorney General's defensive reaction to the decision in his July 19, 2001 Memorandum, suggested that certainly the INS was not "already doing everything the Supreme Court said."[110]

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105. *Id.*
106. *Id.*
107. Nguyen interview, *supra* note 8.
108. *Id.*
109. Naranjo interview, *supra* note 28.
110. See full Officer Naranjo quote *infra* at p. 32 and *supra* note 28.

Since the INS's response to, and interpretation of, *Zadvydas* is central to the way in which the lives of individuals facing indefinite detention were or were not affected by the decision, I scrutinize it here. Ashcroft's July 19, 2001 Memorandum (hereinafter "Memorandum") directed the INS to take on two specific tasks "in order to carry out [his] responsibilities under the decision."[111] First, it required the INS to "draft . . . regulations that set forth a procedure for aliens subject to a final order of removal to present a claim that they should be released from detention because there is no significant likelihood that they will be removed in the reasonably foreseeable future."[112] Second, the Memorandum required the INS to implement the interim procedures — procedures that Ashcroft sets out in the remainder of the Memorandum — "until the regulations are published . . . with respect to aliens subject to a final order of removal."[113]

Early in the Memorandum, the Attorney General formally acknowledged his duty to follow the Supreme Court decision: "the Department of Justice and the Immigration and Naturalization Service are obligated to abide by the Supreme Court's ruling and to apply it to the thousands of aliens who are currently in detention after receiving final orders of removal."[114] However, even before the Attorney General stated the Department's obligation to abide by the Supreme Court's ruling, he began constructing indefinite detainees as "violent criminals."[115] Ashcroft stated, "The Supreme Court's ruling will inevitably result in anomalies in which individuals who have committed violent crimes will be released from detention simply because their country of origin refuses to live up to its obligations under international law."[116] At a press conference soon after the Memorandum was released to the public, Ashcroft said it was

111. Ashcroft Memorandum, *supra* note 26.

112. *Id.* at 3 (parenthesis omitted). The timetable Ashcroft set out in the Memorandum set July 31, 2001 as the date by which the INS had to present these regulations to him. Immigrants' rights advocates speculated that the INS drafted the regulations and they were on Ashcroft's desk by the July 31, 2001 deadline. However, given the events of September 11th and the Department's shift in resource and time allocation as a result of those events, Ashcroft did not publish an "interim rule" on the continued detention of detainees with final removal orders until November 14, 2001, nearly five months after the Supreme Court decided *Zadvydas*. Joyce interview, *supra* note 38; CLINIC, INS DETENTION POST-*ZADVYDAS V. DAVIS*: JULY 2001–JANUARY 2002, *supra* note 104.

113. Ashcroft Memorandum, *supra* note 26, at 4.

114. *Id.* at 1.

115. Ashcroft certainly does not have a monopoly on the construction of noncitizens as criminals. For a discussion of the history and process of the criminalization of immigrants, see Bill Ong Hing, *The Immigrant as Crimina: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79 (1998).

116. Ashcroft Memorandum, *supra* note 26, at 1.

crucial that the nationals get deported because "their history of serious crime makes them a threat to our community."[117]

A multitude of immigrants rights advocates immediately attacked Ashcroft's construction of indefinite detainees as "violent" and "criminal." The American Civil Liberties Union (hereinafter "ACLU") criticized Ashcroft's suggestion that the majority of the individuals facing indefinite detention were "dangerous criminals" when in fact the majority — all of whom have completed their sentences and been released by the criminal justice system — "d[id] not fit into that broad and vague category."[118] According to Judy Rabinovitz, senior staff counsel for the ACLU Immigration Rights Project[119] in New York, "The Constitution does not let us hold people on the prediction they could be dangerous. For the Attorney General to suggest the public will be in danger is unconscionable. He knows that is not the case."[120] Lucas Guttentag, Director of the ACLU Immigration Rights Project, criticized Ashcroft's construction of indefinite detainees as "criminals," emphasizing the strict terms of supervision under which all detainees would be released. "Contrary to the Attorney General's suggestion, the Supreme Court clearly addressed this precise issue by noting that the detainees would be released under strict conditions, that violators would be returned to jail, and that predictions of future dangerousness alone are not a permissible basis for indefinite incarceration."[121]

At a press conference soon after the July 19th Memorandum was released to the public, Ashcroft stated, "I am especially concerned that these criminal aliens may re-enter and prey upon immigrant communities within the United States."[122] With this statement Ashcroft broadened his "indefinite detainee as criminal" construction by suggesting that one reason for the continued incarceration of indefinite detainees was to further the goal of safety for immigrant communities.

People at varying points on the ideological spectrum were quick to doubt the Attorney General's formal acceptance of the Supreme Court decision. According to Judy Rabinovitz. "The Attorney General's statements are an ominous indication of a

117. Thompson, *supra* note 30.

118. AMERICAN CIVIL LIBERTIES UNION, ACLU REFUTES ATTORNEY GENERAL'S STATEMENTS ON SUPREME COURT-ORDERED RELEASE OF IMMIGRANTS, (July 20, 2001), *available at* http://www.globalexchange.org/education/california/news2001/aclu072001.html last time visited February 26, 2003).

119. The ACLU's Immigrants' Rights Project has coordinated efforts around the country to overturn indefinite detention orders.

120. Caryl Clarke, *Reviewers weigh how dangerous they deem each detainee to be*, YORK DAILY RECORD, Sept. 4, 2001.

121. AMERICAN CIVIL LIBERTIES UNION, *supra* note *118.*

122. Thompson, *supra* note 30.

lack of respect for Supreme Court decisions . . . These comments seem to violate the spirit if not the letter of the Supreme Court's declaration that these individuals must be freed."[123] Former INS counsel and current professor at the Georgetown Law Center T. Alexander Aleinikoff stated, "[t]he Department of Justice is taking a narrow view of the court's opinion and will try to continue to detain people who they feel pose a threat to public safety."[124]

A. *Ashcroft's Response to Zadvydas: A Multi-Pronged Action Plan*

In both the July 19th Memorandum and in various press conferences soon after, Ashcroft made it clear that his first priority was to work with the State Department to pressure the home countries of individuals who otherwise face indefinite detention "to live up to their international obligations and repatriate them."[125] Ashcroft vowed to take action against countries that refuse to accept the immigrants or unreasonably delay their return, stating: "I will not hesitate to exercise my responsibility under this statute to identify countries which repeatedly and wantonly violate international law."[126]

After a meeting between the Justice, INS and State Departments on July 19, 2001, State Department spokesperson Philip Reeker said United States diplomats would "speed contacts with foreign governments for the repatriation of foreign nationals" and would try to work with foreign governments to resolve the issue.[127] However, Ashcroft's plan goes far beyond simply "speed[ing up] contacts with foreign governments for repatriation." Ashcroft explained at a speech in Denver less than a month after his July 19th Memorandum was published that he was considering asking Secretary of State Colin Powell to "discontinue granting visas" to citizens of countries that do not cooperate.[128] He also directed the Department of Justice to develop procedures to maximize INS authority to continue to hold criminal "aliens" while such "diplomatic efforts" were under way.[129]

As of July 19, 2001, the State Department did not plan to stop issuing visas,[130] and according to Justice Department officials, even the suggestion that the United States would discon-

123. AMERICAN CIVIL LIBERTIES UNION, *supra* note *118.*
124. Clarke, *supra* note 120.
125. *Attorney General Outlines DOJ's response to Recent Case on Detaining Criminal Aliens*, THE UNITED STATES LAW WEEK, August 7, 2001, at 2077.
126. Zagaris, *supra* note 32.
127. Thompson, *supra* note 30.
128. *Attorney General Outlines, supra* note 125.
129. *Id.*
130. Thompson, *supra* note 30 (according to State Department spokesperson Philip Reeker).

tinue granting visas to countries that would not cooperate with repatriation efforts was unprecedented.[131] Such "diplomatic efforts" during the months after *Zadvydas* were particularly troublesome in that they completely ignored the histories of these countries.[132] Yet these histories were crucial to an understanding of the political frameworks and social circumstances that prevented these countries from admitting their nationals and precluded an immediate repatriation agreement with the United States.

The second prong in Ashcroft's action plan was informed by his construction of indefinite detainees as "violent criminals." He directed the Department of Justice to work closely with state and local authorities to determine whether any detainees could be returned to their custody in the event they have criminal sentences they have not yet served.[133] Ashcroft also instructed federal prosecutors to explore whether more charges could be brought against the detainees. Chris Nugent, of the American Bar Association, said the policy to ask district attorneys to look for new charges "raises certain due process issues" since the people have already been prosecuted and served their sentences."[134] Finally, Ashcroft ordered new procedures for the handling of "special risk" cases, such as those involving terrorists.[135]

Ashcroft's directive for the Department of Justice to develop release conditions was also informed by his construction of individuals facing indefinite detention as "criminals." For example, there were registration requirements and limitations on certain activities that would "maximize public protection" and permit the government to return released noncitizens to detention if the conditions were violated.[136]

Ashcroft used his July 19th Memorandum to create two loopholes in *Zadvydas*. He devoted a sizeable portion of the Memorandum to outlining two ways in which he views continued detention as justified under *Zadvydas*: (1) due to "special circumstances;" or (2) because "reasonable efforts to remove the alien"

131. *Id.* at A2, col.1. Unprecedented or not, *compare* Hing, *Deported for Shoplifting?, supra* note 37, where just such "diplomatic efforts," including promises of further economic aid, enticed Cambodia into signing a repatriation agreement in March of 2002.

132. For a more focused discussion that frames the way in which Cambodia's nationality laws have been informed by political instability and the rise of nationalism in Cambodia, *see* Jana M. Seng, *Cambodian Nationality Law and the Repatriation of Convicted Aliens Under the Illegal Immigration Reform and Immigrant Responsibility Act.*

133. *See* discussion *supra* at p. 30-33.

134. *Zagaris, supra* note 32.

135. *Id.*

136. Ashcroft Memorandum, *supra* note 26, at 5; *See also Attorney General Outlines DOJ's response, supra* note 125, at 2077.

are still underway. In regards to the "special circumstances" loophole, Ashcroft "direct[ed] the INS to develop regulations to address the situations that present special circumstances of the sort identified by the Supreme Court in *Zadvydas*, such as terrorists or other especially dangerous individuals."[137] Here, Ashcroft conflated the "terrorist"[138] exception the Court did carve out with an "especially dangerous individuals" standard that he, and not the Court, invented. Ashcroft's construction of the "especially dangerous individual" was particularly vague when compared to the Court's more narrowly construed, "dangerousness plus special circumstances" standard.[139] Nonetheless, Ashcroft directed the Department of Justice to develop procedures for continuing to detain noncitizens whose prompt removal was not likely but whose continued detention might be justified by "special circumstances" such as "special risks" posed by "terrorists or other especially dangerous individuals."[140] As the discussion of this loophole illustrates, Ashcroft was attempting to broaden the circumstances justifying continued detention long before the events of September 11th took place, or any provisions of the Patriot Act were passed.

The second loophole Ashcroft created was the "reasonable efforts to remove the alien are still underway" or the "travel documents are imminent." This exception put individuals facing indefinite detention from countries like Haiti, Jamaica, China and the like at particular risk.[141] Detention Watch Network, a coalition of advocacy groups, explained the INS's application of this loophole:

> [T]he INS considers any length of time, even more than five years, as the foreseeable future. This enabled the INS to continue incarcerating detainees from countries that take indeterminate lengths of time to repatriate an individual under the rhetoric that they would be able to produce travel documents in the "reasonably foreseeable future."[142]

In the weeks after the Supreme Court decided *Zadvydas* and Ashcroft published his Memorandum, several federal district courts heard cases requiring them to interpret the "reasonable

137. Ashcroft Memorandum, *supra* note 26, at 4.

138. *Zadvydas*, 533 U.S. at 696. Here the Court made clear that it was not considering "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and . . . with respect to matters of national security." *Id.*

139. *See* discussion of "dangerousness plus" standard *infra* at p. 26 and note 85.

140. Ashcroft Memorandum, *supra* note 26, at 4.

141. People in the second of the two categories of indefinite detention described in Part I are particularly vulnerable to this loophole. See discussion *infra* at pp. 11-12 and notes 18-19.

142. Caryl Clarke, *The Pressure Might Get Some Immigrants Out of York County Prison*, YORK DAILY REC. (August 25, 2001).

efforts to remove the alien are still underway" or the "travel documents are imminent" loophole. I will now explore these cases not only to talk about the legal regimes in place at this particular moment, but also to capture the vulnerable place in which individuals whose cases were being heard by the courts post-*Zadvydas* were nevertheless situated.

The United States District Court for the Southern District of New York denied Gavin Lawrence's writ of habeas corpus, stating that the "petitioner's removal from the country appears to be imminent."[143] The court recognized that Mr. Lawrence "remained in custody for a lengthy period" and that "part of the delay was an unfortunate result of an administrative error."[144] However, the court concluded, "that affords no basis for releasing petitioner from custody."[145] Thus, despite a "lengthy period" of detention that was partly caused by "administrative delays," removal "appear[ed]" to be imminent and thus Mr. Lawrence did not escape this *Zadvydas* loophole.[146]

The United States District Court for the District of Rhode Island, however, found that Mr. Williams, a man from the Bahamas, did not fall into this loophole.[147] The court granted his writ of habeas corpus, basing their decision on the following grounds:

> In light of the fact that Williams has been incarcerated for twenty months awaiting deportation, that the BIA [Board of Immigration Appeals] has allowed his appeal to languish for twenty months, that the government has not offered any time table on when deportation will be accomplished . . . I find that the continued detention of Williams is unreasonable, excessive, and "shocks the conscience" in violation of the substantive component of the Fifth Amendment's due process clause.[148]

The Southern District Court of New York found that removal was still reasonably foreseeable despite a "lengthy period" of detention and administrative delays.[149] The District Court of Rhode Island, however, came to the opposite conclusion based on similar criteria. Here, both the twenty-months of incarceration and the Board of Immigration Appeals' lengthy delays lead the district court to conclude that continued detention was not

143. Gavin Lawrence v. Janet Reno, 2001 U.S. Dist. LEXIS 9953 (S.D. NY, 2001).

144. *Id.* at 9953.

145. *Id.*

146. *Id.*

147. Sylvanus Emmanuel Williams, Sr. v. Immigration and Naturalization Service, 2001 U.S. Dist. LEXIS 15800 (Dist. RI, 2001).

148. *Id.* at 15814.

149. *Gavin Lawrence*, 2001 U.S. Dist. LEXIS 9953 (S.D. NY, 2001).

only unreasonable, but "shock[ed] the conscience."[150] Furthermore, the Rhode Island District Court recognized that the Government failed to produce "any time table" for deportation. Thus, the Government failed to meet its burden under *Zadvydas* of providing evidence that rebuts the noncitizen's showing that there is no significant likelihood of removal in the reasonably foreseeable future.[151] Finally, the Rhode Island District Court focused on Mr. Williams' due process rights. The Southern District of New York, however, made no mention of either the Government's burden to produce some sort of time table for deportation or Mr. Lawrence's due process rights.

A third United States District Court looked into a similar case as well. Like the District Court of Rhode Island, the District Court of Massachusetts required the Government to meet its burden of producing evidence that removal was imminent and took Mr. Zhou's long period of detention into account.[152] "Although, according to the INS, the Attorney General and Secretary of State have approached the government of China in order to expedite the issuance of travel documents for nationals awaiting removal, Petitioner's ever-increasing thirteen-month detention far exceeds *Zadvydas'* presumptively constitutional six-month time limit."[153] The court concluded that "[g]iven the amount of time that he has been in detention and the lack of assurances from the INS that the necessary paperwork from China is currently on its way," Mr. Zhou had no reason to believe that he would be removed in the reasonably foreseeable future.[154]

The District Court of Massachusetts refused to give the INS the benefit of the doubt and allow Mr. Zhou to fall into the "travel documents are imminent" loophole. Although the court did not unconditionally grant Mr. Zhou's writ of habeas corpus, (as the District Court of Rhode Island did for Mr. Williams),[155] it did order that the writ would be issued if Mr. Zhou was not repatriated within sixty days.[156]

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150. *Sylvanus Emmanuel Williams*, 2001 U.S. Dist. LEXIS at 15814.

151. *Zadvydas*, 533 U.S. at 699-702.

152. Wei Zhou v. Steven Farquharson, 2001 U.S. Dist. LEXIS 18239 (Dist. MA 2001).

153. *Id.* at 18241-18242.

154. *Id.* at 18243.

155. *Sylvanus Emmanuel Williams,* 2001 U.S. Dist. LEXIS at 15815. Here the court granted Williams' writ of habeas corpus without making any sort of qualification.

156. *Wei Zhou*, 2001 U.S. Dist. LEXIS at 18242.

V. A FINAL RECOMMENDATION INFORMED BY THE WAY *ZADVYDAS* AFFECTED THE LIVES OF INDIVIDUALS FACING INDEFINITE DETENTION AT THE SAN PEDRO SPC

There was a high level of awareness about *Zadvydas* among indefinite detainees at the San Pedro SPC even before the Supreme Court had decided the case. However, the racially segregated living quarters within the San Pedro SPC made information gathering and sharing across various populations within the indefinite detention community particularly difficult.

All men classified by the INS as "Asian" who are incarcerated at the San Pedro SPC live in "pod 3."[157] The Cubans, however, are spread throughout "pods" 1, 2, and 4.[158] Although most of the Asian detainees — all of the Cambodians, Laotians, and Vietnamese individuals — as well as all of the Cubans share the same indefinite detention status, the segregated living quarters make information sharing across the "pods" practically impossible.[159] As a result, most of the information gathering and sharing regarding the *Zadvydas* decision happened within the segregated living areas.[160] For example, Vietnamese, Cambodian, and Laotian detainees shared information across their respective national origin groups, but this information sharing did not, for the most part, reach the Cubans who did not live in the same area. Most of the information gathering and sharing regarding the decision happened within "the pod," and therefore, among individuals within the same racial group.

However, there was one creative way in which a small group of detainees were able to unify the indefinite detention commu-

157. The guards at the San Pedro SPC referred to "pod" 3 as "the pod with the indefinites." Cheer interview, *supra* note 48.

158. Joyce interview, *supra* note 38. Ensuring that Cubans are dispersed throughout detention facilities seems to be an INS strategy to prevent Cubans from having a critical mass in any one living area. This comes in response to the history of organized Cuban resistance in INS detention centers and county jails.

159. Martinez interview, *supra* note 1; Nguyen interview, *supra* note 8; In interview, *supra* note 9; Pak interview, *supra* note 12.

160. I witnessed an example of such information sharing between the men in "pod" 3 during my interview with Mr. Nguyen. As I picked up the phone in the visiting room, he held a scrap of paper up to the glass. Fifteen names and their corresponding "alien" registration numbers (commonly referred to as "A" numbers) were listed on the paper. Mr. Nguyen had spoken with a few friends in "pod 3" and they were all interested in meeting with me. Unfortunately I was not able to meet with all of these men. But the speed with which the word spread among the "pod" and the organized way in which Mr. Nguyen (and perhaps others) recruited fifteen people to speak to me about their struggles as indefinite detainees showed an impressive level of organization and solidarity. These individuals, both those that I was able to interview and those who put their names on Mr. Nguyen's list that I unfortunately could not interview, clearly wanted people beyond the San Pedro SPC to hear their stories.

nity across the racial divides enforced by the INS' segregated living areas. The unlikely space in which information sharing occurred beyond the INS-created Asian/Latino and detainee/non-detainee divides was the detention center kitchen.[161]

Sergio Martinez,[162] from Cuba, and Vanna In, from Cambodia, were kitchen workers. Although they were strip-searched every day on the way to and from the kitchen, and were paid only 20 cents per hour for their work, they each explained how there was something constructive about their work in the kitchen. It at least made the waiting, the not knowing when or if they would be released, a little easier. The kitchen work also gave them an opportunity to form friendships with individuals living outside their "pod" as well as beyond the detained community, since the kitchen supervisor was a non-detained employee.[163]

Mr. Martinez had been a friend of both the kitchen supervisor and his fellow worker Mr. In for a few months when the Supreme Court decided *Zadvydas*. His friendship with the kitchen supervisor led to information sharing that reached beyond the detained population. According to Mr. Martinez, everyone in the kitchen knew where everyone else was from.[164] So when the supervisor saw *Zadvydas* reported in the news, he made a copy of the article and brought it to work the next day for his friend in the kitchen.[165] Mr. Martinez passed the article on to Mr. In.[166] Then each brought the article back to his respective "pod" to share the information with the others who lived in the same area and were also facing indefinite detention. Thus, Mr. In's friendship with Mr. Martinez — and the space they occupied as kitchen workers — allowed information sharing between Asians and Cubans despite the INS policy of racially segregated living quarters.[167]

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161. Martinez interview, *supra* note 1; In interview, *supra* note 9.

162. For more background on Mr. Martinez, see *supra* note 1 and quotes and discussion *infra* pp. 2-3 and 9.

163. Martinez interview, *supra* note 1. In interview, *supra* note 9.

164. Martinez interview, *supra* note 1.

165. *Id.*

166. Fortunately language did not present itself as a barrier to information sharing between Mr. Martinez and Mr. In. The United States was the only country Mr. In knew, having arrived with his family when he was only a year-and-a half old. Mr. Martinez had been in the United States since the age of twenty-one and he knew more than enough English to communicate with the monolingual English-speakers (like Mr. In) who worked with him in the kitchen. *Id.*

167. I learned about the ways in which the kitchen was a source for information sharing through the Nguyen, In and Martinez interviews. When I asked Mr. Nguyen about information sharing in regards to the *Zadvydas* decision, he told me about Mr. In's communication with "a Cuban guy in the kitchen." (Mr. In's name and A number was one of the fifteen listed on the scrap of paper Mr. Nguyen gave me. *See infra* note 160.) During my interview with Mr. In, I learned more than simply the

I personally benefited from this commitment to information-sharing as well. I first learned of the *Zadvydas* decision during a rights presentation at the San Pedro SPC. Several Cubans were asking me how I thought the Supreme Court would decide the case. Immigrant rights advocate Laurie Joyce remembered getting a letter from a detainee asking, "Do you think O'Connor will come down on our side?"[168] While not every indefinite detainee had access to this level of information, the indefinite detention community's general awareness about this decision was, and continues to be, particularly high.

There is no doubt that some individuals managed to escape indefinite detention thanks to *Zadvydas*. Shortly after I interviewed Mr. In and Mr. Nguyen at the San Pedro SPC, they were released and are now home with their families.[169] However, there is also no doubt that like Mr. Martinez, thousands more remain unjustly incarcerated.

Having carefully examined the decision, and informed by the voices of a group of individuals facing indefinite detention at the San Pedro SPC, I move now to recommend three specific ways to use this post-*Zadvydas* and pre-Patriot Act historical moment to advance the current struggle against indefinite detention. First, we must continue to investigate the ways in which the INS is not meeting its burdens under *Zadvydas* and to hold it accountable. Second, we must track and expose changes in the community of indefinite detainees post-*Zadvydas* and in the aftermath of September 11th. Third, we must assist those communities — particularly Mariel Cubans — who have not yet reaped any of the benefits of the *Zadvydas* decision.

First, an aggressive monitoring project must investigate the ways in which the INS is not meeting its burdens under *Zadvydas*. According to the Court, once the individual facing indefinite detention "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."[170] The INS, and not the detainee, had the

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name of this "Cuban guy in the kitchen." Mr. In said he knew Mr. Martinez would want to talk to me, so he gave me not only his name but also his "A" number (which he had memorized) so that I could locate him without any difficulty. The information networks these individuals managed to create beyond their "pods" (and thus across racial lines) were quite amazing, especially from within a detention center with such an intense, race-based segregation policy and a generally high level of surveillance.

168. Joyce interview, *supra* note 38.

169. Mr. Pak, whom I interviewed a few days after his release from the San Pedro SPC, was re-arrested approximately a month after our interview and because he could not afford the bail set, remained incarcerated as he awaited trial. Cheer interview, *supra* note 48, and telephone conversation, mid-November 2001.

170. *Zadvydas*, 533 U.S. at 701.

burden to produce such things as a letter from the consulate stating the arrival of travel documents, or a timetable for deportation,[171] in the near future. However, even before the changes in the indefinite detention community that took place after September 11th, the INS regularly denied the release of indefinite detainees without producing any such evidence.[172] An aggressive monitoring project would hopefully help to correct this problem and put pressure on the INS to be more accountable for its responsibilities outlined in *Zadvydas*.

An aggressive monitoring project must also document changes in the community of individuals facing potentially indefinite detention since the events of September 11th and the passing of the Patriot Act. Some individuals from countries such as Saudi Arabia, Pakistan, Iran, Iraq and others — a list that includes both Arab and non-Arab countries — were regularly being released from INS detention before September 11th, but are now being detained by the INS for extremely long periods of time[173] and under horrendous conditions.[174] This project would need to capture the changes in the indefinite detention community due to the racial profiling of individuals of "Arab appearance" and "Muslim identity,"[175] as well as due to the targeting of new countries. Ideally, such an aggressive monitoring project would document the way in which changes in the indefinite detainee community have led to new INS abuses that might otherwise have remained hidden.

After documenting the post-September 11th changes in the indefinite detention community, an aggressive monitoring project must also highlight the ways in which the community stayed the same. Addressing the reality of Mariel Cubans, for example, who continue to face indefinite detention and have not reaped any of the benefits of *Zadvydas*, remains crucial to the project of using the pre-Patriot Act historical moment to address the current struggles of indefinite detention. As far as the Attorney General and most Federal District Courts are concerned, the *Zadvydas* decision included only "removable aliens" — immigrants who were legally admitted into the United States — and not "inadmissible aliens," the immigration status of Mariel

171. *See* Sylvanus Emmanuel Williams, Sr. v. Immigration and Naturalization Service, 2001 U.S. Dist. LEXIS 15800 (Dist. RI 2001); *see also* discussion *infra* pp. 35-36.

172. Joyce interview, *supra* note 38.

173. *Id.*

174. *See* Sameer M. Ashar, *Symposium: Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11,* 34 CONN. L. REV. 1185, 1186-1192 (2002).

175. *See* Akram and Johnson, *supra* note 2.

Cubans, considered by the INS to have been stopped at the border.[176]

Although both of the petitioners in *Zadvydas* were former legal permanent residents, several immigrants' rights attorneys argued in the days following the decision that Mariels should not necessarily be excluded from the decision. Lucas Guttentag, while acknowledging that the Supreme Court's decision came in a case involving legally admitted immigrants, explained that "the ACLU believes that the Court's ruling applies to all immigrants regardless of status because the Court ruled that the law on which the INS relies does not authorize indefinite detention."[177] Laurie Joyce made a similar argument that also focused on the statute the Court construed in *Zadvydas*. She argued that despite the different legal status of "removable" and "inadmissible" individuals, *Zadvydas* also applies to Mariels considered "inadmissible" since both groups of indefinite detainees are being held under the same statute, 8 U.S.C. 1231(a)(6).[178] It is this statute — the statute providing that the government "may" detain a removable "alien" beyond the ninety-day statutory removal period — which the Court construes in *Zadvydas*.[179] Thus, since individuals deemed "removable" and "inadmissible" are both being detained under the same statute, the way in which the Supreme Court construes the statute in *Zadvydas* should apply equally to both groups of immigrants.

Despite these creative arguments from immigrants' rights lawyers during the months post-*Zadvydas* and pre-Patriot Act, the Attorney General, along with the Sixth Circuit and U.S. District Courts in Texas, Louisiana and New Jersey, continued to doom Mariels, along with all other individuals facing indefinite detention who did not legally enter the United States, to continued incarceration with no end in sight.[180] Yet creating arguments in which Mariels are included in the *Zadvydas* decision continues to be a valuable exercise. In the weeks after the *Zadvydas* decision, immigrants' rights advocates were strategizing about litigation that specifically addressed the unique plight of the Mariels.

176. *See* discussion *infra pp.* 19-20.

177. AMERICAN CIVIL LIBERTIES UNION, *supra* note 118.

178. Joyce interview, *supra* note 38.

179. *See* discussion of the Court's construction of 8 U.S.C. § 1231(a)(6) *infra* p. 25.

180. *See* Reynero Arteaga Carballo v. Mark Luttrell, 2001 U.S. App. LEXIS 21695 (6thCir. 2001); Jorge D. Beltran-Leonard v. INS, 2001 U.S. Dist. LEXIS 14982 (N. Dist. TX 2001); Juan Ventura Vera v. Anne Estrada, 2001 U.S. Dist. LEXIS 17790 (N. Dist. TX 2001); Pedro Rollardo-Suarez v. Sam L. Pratt, 2001 U.S. Dist. LEXIS 17764 (N. Dist. TX 2001); Osvaldo Damas-Garcia v. U.S.A., 2001 U.S. Dist. LEXIS 17498 (Dist. NJ 2001); and Juan C. Fernandez-Fajardo v. INS, No. 01-266-D (Middle Dist. LA 2001).

Jay Stansell, an assistant federal public defender in Seattle who argued *Kim Ho Ma v. Reno*[181] in front of the Ninth Circuit, hoped to bring a case looking at the constitutionality of the indefinite detention of Mariels to the Ninth Circuit.[182] However, finding such a case that would eventually end up before the Ninth Circuit was particularly difficult given the relatively small numbers of Mariel Cubans in INS detention on the West Coast. Most of the Mariels are currently detained in Pennsylvania, Louisiana and Florida — with Circuit Courts not well known for their progressive decisions.[183] Whether or not the Ninth Circuit will hear such a case remains to be seen.

Ideally, an aggressive monitoring project would provide evidence for the proposition that the "serious constitutional problem"[184] at stake for Mr. Zadvydas and Mr. Ma is also at stake for Mr. Martinez and the thousands of Mariel Cubans like him who currently face "indefinite, perhaps permanent, deprivation of human liberty."[185] It is a proposition we must not allow Ashcroft, the INS, or any other institution to conveniently bury given the new attacks on civil rights under the Patriot Act.[186]

Informed by, but not limited to, what is happening in the courts and the legislature, detainees continue to resist indefinite detention through individual acts and organized group resistance. After the *Zadvydas* decision, the events of September 11th, and the passing of the Patriot Act, just as before them, the struggle to end the indefinite detention of immigrants continues.

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181. Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000). *See* discussion of Kim Ho Ma v. Reno *supra* at pp. 23-25 and note 66.
182. Joyce interview, *supra* note 38.
183. *Id.*
184. *Zadvydas*, 533 U.S. at 962.
185. *Id.* at 2500.
186. *See* Akram and Johnson, *supra* note 2, at 327-55.