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When We Cannot Deport, Is It Fair to Detain?: An Analysis of the Rights of Deportable Aliens Under 8 U.S.C 1231(a)(6) and the 1999 INS Interim Procedures Governing Detention

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I. INTRODUCTION

As one author wrote, "America has been a nation of immigrants from the start."[1] Indeed, for many years in its early history and still today, "[t]he United States [has been] a strong magnet for immigrants, offering them chances to take up farms in the country or jobs in the cities."[2] In fact, between the years of 1820 and 1990, the Immigration and Naturalization Service ("INS") recorded the entry of more than one hundred and twelve million immigrants into the United States.[3] Though many of these aliens welcomed to the United States gain citizenship and live productive lives after their arrival, some do not.

One individual who has not led a productive life since coming to the United States is Kestutis Zadvydas. Zadvydas, an immigrant from Germany, came to the United States in 1956, at the age of eight, and shortly thereafter began building an extensive criminal record.[4] During his first twenty years in the United States, Zadvydas was convicted of two serious offenses—attempted robbery and attempted burglary—as well as a number of less serious offenses.[5] Based on these two convictions, the INS initiated deportation proceedings in 1977, but shortly before he was to appear in front of an immigration judge in 1982, Zadvydas disappeared.[6]

1. 1 GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 278 (3d ed. 1992).

2. *Id.* at 461.

3. *See id.* at A36–37.

4. Zadvydas v. Underdown, 185 F.3d 279, 283 (5th Cir. 1999). Though Zadvydas was given permanent resident status after his arrival, he never became a citizen of the United States. *See id.*

5. *See id.*

6. *See id.*

For the next five years, the INS was unable to find him. Then, in 1987, he was arrested in Virginia for possession of cocaine with intent to distribute but went into hiding again after jumping bail.[7] It was not until 1992, when Zadvydas voluntarily turned himself over to authorities in Texas, then the INS was able to discover his whereabouts and take him into custody.[8] He was tried and convicted on the 1987 narcotics distribution charge and was sentenced to sixteen years in prison with six years suspended; Zadvydas served two years before he was released on parole.[9] Shortly after his release, the INS took him into custody and reinitiated deportation proceedings. In March of 1994, an immigration judge, based on Zadvydas' history of flight, ordered that he be detained without bond during deportation proceedings.[10] He has been in INS custody since that time and for the past six years has been awaiting deportation.[11]

In many cases, the deportation of aliens is effected within a short period of time—most aliens are deported within just a few months of the entry of a final deportation order. However, not all aliens are easily deported. One such alien is Zadvydas, who, due to circumstances clearly beyond his control, is essentially "stateless" and thus has no country to which he can be deported.[12] Another is Kim Ho Ma, "who left his native land, Cambodia, as a refugee at the age of two and has resided in the United States as a legal permanent resident since he was six."[13] In 1997, as a result of his participation in a gang-related shooting and a subsequent conviction for manslaughter, the INS began deportation proceedings against Ma. However, because the United States has no repatriation agreement with Cambodia, Ma is also undeportable.[14] A number of other countries, such as Laos and Vietnam, also have no signed repatriation agreements with the

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. For more on Kestutis Zadvydas's story, see Pamela Coyle, *Ex-Cons Without Country in Limbo*, TIMES-PICAYUNE, Sept. 6, 1999, at A1.

12. For an explanation of the reason that Zadvydas is "stateless," see *Underdown*, 185 F.3d at 291–94.

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

14. *See id.* A repatriation agreement is essentially an agreement that allows each country party to the agreement to return to the other country its lawful citizens.

United States; so aliens arriving from those countries similarly cannot be deported.[15]

The problem that arises in situations such as Ma's and Zadvydas's involves a decision of what to do with these unwanted yet undeportable aliens. Because the United States has no repatriation agreement with their respective nations, deportation is highly unlikely. Yet many of these aliens have extensive criminal records and are considered either dangers to the community, high risks of flight—meaning it is unlikely that, if ordered deported and then released, they will voluntarily stay in contact with the INS until deportation is made possible—or both.[16] To protect the public from potential recidivism or, in the alternative, to make sure the alien ordered deported does not abscond, those aliens ordered deported who are found to be dangerous or flight risks are physically detained by the INS in local, state, or federal prisons. This detention, however, is problematic, for what arises in these situations is the possibility of indefinite detention—criminal aliens potentially being detained for life because they cannot be deported and the INS does not want to release them into the community. According to some, there are over 2,800 such "lifers" now in INS custody.[17]

On a legal level, the problem that arises in these situations involves a clash of two important parts of the United States Constitution.[18] On the one hand, Article I of the Constitution gives Congress the power to exclude aliens and determine who is welcome within the borders of the United States—Congress has the power to "estab-

15. *See id.* at 818 n.1.

16. "[O]ne Justice Department report concluded that 90 percent of aliens released from custody abscond." Chi Thon Ngo v. INS, 192 F.3d 390, 395 (3d Cir. 1999).

17. *See* Mike Clary & Patrick J. McDonnell, *Sentenced to a Life in Limbo*, L.A. TIMES, Sept. 9, 1998, at A1; *see also* Phan v. Reno, 56 F. Supp. 2d 1149, 1151 (W.D. Wash. 1999) ("More than one hundred habeas corpus petitions are currently pending in the Western District of Washington wherein aliens ordered deported to countries that have refused them admittance challenge the legality of their continued detention by the Immigration and Naturalization Service (INS)."). For more information on the problems facing both the INS and those aliens being detained pending deportation, see Dan Malone, *INS Faulted in Extended Detentions*, DALLAS MORNING NEWS, Dec. 12, 1999, at 1A. For the story of another alien currently awaiting an unlikely deportation in prison, see Mark Bixler, *When Jail Becomes Limbo*, ATLANTA J. & CONST., Apr. 9, 2000, at 1D.

18. As one court put it, "[s]erious conflicts between policy and constitutional concerns are presented by criminal aliens whose countries of origin refuse to repatriate them. Congress' measures to insulate the community from potentially dangerous criminal aliens via lengthy detention have the potential to violate due process. Yet alternatives to incarceration have problems as well." *Chi Thon Ngo*, 192 F.3d at 395.

lish an uniform Rule of Naturalization . . . throughout the United States."[19] On the other hand, the Fifth Amendment provides a guarantee of freedom from detention in that "[n]o person shall be . . . deprived of life, liberty, or property, without due process."[20] In practical terms, the United States Congress has the power to exclude unwanted aliens such as Zadvydas. Yet, when such an alien cannot be deported—as Zadvydas cannot—questions arise. Does the United States have to respect the alien's presence in the United States and, in contravention of Article I, let that person remain in our country? Or can the United States, under the power given it by the Constitution to control its borders, hold an unwanted alien in custody until he or she can be deported? Finally, if the United States does have the power to detain an alien, but deportation cannot ever be effected, can they detain that alien indefinitely without violating the alien's right to due process? These questions have only recently begun to be addressed by the federal courts, which, without direct guidance from the Supreme Court, have provided a wide-ranging panoply of answers to the above questions.

This Comment will attempt to address the clash between these two parts of the Constitution and the important legal questions that a situation such as Zadvydas's causes to arise. Part II of this Comment addresses the background of immigration law, due process, and the Attorney General's statutory authority to detain aliens. Part III analyzes the differing views of the courts that have ruled on the issues presented above. Part IV analyzes the arguments set forth by the various courts and proposes that, in cases of potential indefinite detention, courts should permit long-term detention of unwanted criminal aliens when releasing them would be disadvantageous to the community, even if that detention becomes indefinite. Finally, this Comment concludes with Part V, a concise summary of the policies, issues, and answers presented herein.

II. BACKGROUND

Under Article I of the United States Constitution, Congress has the power to "establish an uniform Rule of Naturalization . . .

19. U.S. CONST. art. I, § 8, cl. 4.

20. U.S. CONST. amend. V. As courts have made clear, the Fifth Amendment refers to the protection of "persons" and not just "citizens."

throughout the United States."[21] This provision has generally been interpreted to mean that Congress can determine which immigrants and aliens should be permitted to enter and remain in the United States.[22] The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process,"[23] which, in one respect, dictates that deprivations of physical liberty should only be permitted when the government has a compelling and narrowly tailored interest that supports it. To understand the way in which these provisions clash in alien-detention situations, a general understanding of immigration law and due process is required.

A. Immigration Law

Much has been written about the law of immigration, a subject so vast that volumes have been dedicated to its study. This Comment addresses only one sphere of immigration law—that of the detention of unwanted deportable aliens. However, in order to understand the issues presented and analyzed in this Comment, as well as the arguments and decisions in the cases discussed herein, one must be familiar with the basics of Congress's plenary power in the immigration law arena, its right to determine which aliens will be allowed to enter and remain in the United States, and the difference between excludable and deportable aliens.

1. Congress's plenary power in immigration law

Congress has a very significant, almost unchecked, power over immigration—a power often referred to as its plenary power. In addressing Congress's power to "establish an uniform Rule of Naturalization," the United States Supreme Court has held that "[t]he exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power to control the foreign affairs of the nation."[24] The power to exclude aliens "is identical regardless of whether the government seeks to exclude an alien who has not entered [the

21. U.S. CONST. art. I, § 8, cl. 4.

22. *See generally infra* Parts II.A.1 and II.A.2. *See also* Fiallo v. Bell, 430 U.S. 787, 792 (1977).

23. U.S. CONST. amend. V.

24. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); *see also* The Chinese Exclusion Case, 130 U.S. 581 (1889).

country], or to expel an alien who has resided" within the borders of the United States for an extended period of time.[25] Additionally, "courts have long recognized that the governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict."[26]

Generally vested only in the legislative and executive branches, this power "to expel or exclude aliens [is also] . . . largely immune from judicial control."[27] As such, "[t]he power of the national government to act in the immigration sphere is thus essentially plenary."[28] In fact, the Supreme Court has even stated that "over no conceivable subject is the legislative power of Congress more complete."[29]

2. The right to accept or exclude aliens

The plenary power gives Congress the right to determine which foreign-born persons are welcome within the borders of the United States, as well as the right to determine which foreign-born individuals are not welcome. With respect to allowing persons born outside of the country to become citizens of the United States, Congress has

25. Zadvydas v. Underdown, 185 F.3d 279, 288 (5th Cir. 1999); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners, who have not been naturalized . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

26. *Underdown*, 185 F.3d at 289; *see also* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); Kleindienst v. Mandel, 408 U.S. 753 (1972); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

27. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953)). Judicial deference to the political branches of the government on immigration matters serves a number of purposes. For example, judicial deference "allows for greater flexibility to adjust policy choices to changing political and economic circumstances" and further "allows the political branches to 'exercise especially sensitive political functions that implicate questions of foreign relations.'" Phan v. Reno, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999) (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (citations omitted)).

28. *Underdown*, 185 F.3d at 289; *see also* Reno v. Flores, 507 U.S. 292, 305–06 (1993).

29. *Fiallo*, 430 U.S. at 792 (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). Though the legislature has great power over the area of immigration, the plenary power is subject to limitation in that it must be exercised in a manner that furthers a legitimate governmental purpose.

adopted a series of rules for a process termed naturalization.[30] On this subject, the Supreme Court wrote that Congress has the power "to prescribe the terms and conditions on which [aliens] come in,"[31] and it is only after full compliance with the terms set by Congress does the privilege of gaining citizenship become a right.[32]

With respect to determining which aliens should not be allowed to enter the United States or remain once they have entered, Congress has a number of options. First, a naturalized citizen is not necessarily guaranteed citizenship for life. In some circumstances, a naturalized citizen is subject to having his or her citizenship revoked.[33] Second, in addition to its power to denaturalize naturalized aliens, Congress has the absolute power to exclude unwanted aliens before naturalization occurs, regardless of how long a particular alien may have resided in the United States. Regarding this power, the Supreme Court wrote:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. . . . "The United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."[34]

30. The Supreme Court has defined naturalization as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 162 (1892). Gaining citizenship through naturalization is a privilege, and as such Congress has a right to set the terms that a person must meet to acquire that privilege. One such term requires that applicants for citizenship be of "good moral character." 8 U.S.C. § 1427(a)(3) (1994). Convicted felons are statutorily deemed to not be of good moral character. *See* 8 U.S.C. § 1101(f)(4) and (5) (1994).

31. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 335 (1909); *see also* The Chinese Exclusion Case, 130 U.S. 581, 603–04 (1889).

32. United States v. Macintosh, 283 U.S. 605, 615 (1931).

33. *See* 8 U.S.C. §§ 1481–1489 (1994); *see also* Costello v. United States, 365 U.S. 265 (1961); Knauer v. United States, 328 U.S. 654 (1946); Johannessen v. United States, 225 U.S. 227 (1912).

34. *The Chinese Exclusion Case*, 130 U.S. at 603–04 (1889) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 413 (1821)); *see also* Kleindienst v. Mandel, 408 U.S. 753 (1972); Hines v. Davidowitz, 312 U.S. 52 (1941); Bugajewitz v. Adams, 228 U.S. 585

The history of American law is replete with legislation regulating and restricting immigration into the United States.[35] The first act of Congress aimed at excluding unwanted aliens from the United States was the Alien Act of 1798, which sanctioned the exclusion of any alien that the President deemed dangerous.[36] Almost a century later, in 1875, Congress enacted legislation which barred convicts and prostitutes from immigrating to and residing in the United States.[37] Other grounds for exclusion were codified shortly thereafter.[38] Some of these additional exclusion-permitting laws included the Chinese Exclusion Act of 1882,[39] and quota-based immigration legislation.[40]

Today, the Immigration and Nationality Act of 1952 ("INA"), with certain revisions made throughout the years, governs the deportability of aliens.[41] The INA contains a list of classes of aliens that can be removed from the United States.[42] Though Congress has set forth the basis for exclusion or deportation in the INA—a right guaranteed it by the Constitution—the courts, subject to the deference granted by the plenary power, remain free to interpret that statute and review its administration by governmental entities.[43]

3. Excludable aliens versus deportable aliens

Immigration law differentiates between at least two different types of aliens in the deportation or removal context. The first, generally termed excludable or inadmissible aliens, are those aliens ineli-

(1913); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904); The Japanese Immigrant Case, 189 U.S. 86 (1903); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).

35. *See generally* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (Johnny H. Killian & George A. Costello eds., 1996).

36. *See id.*

37. *See id.*

38. *See id.* These exclusions included: "idiots, lunatics, convicts, and persons likely to become public charges" (1882); "cheap foreign labor" (1885); "persons suffering from certain diseases, those convicted of crimes involving moral turpitude, paupers, and polygamists" (1891); "epileptics, insane persons, professional beggars, and anarchists" (1903); "feebleminded, children unaccompanied by parents, persons suffering with tuberculosis, and women coming to the United States for prostitution or other immoral purposes" (1907). *Id.* at 277 n.1202.

39. *See id.*

40. *See id.*

41. *See* 8 U.S.C. §§ 1101–1525 (1994).

42. *See id.* at § 1182.

43. *See* INS v. Errico, 385 U.S. 214 (1966).

gible for admission into the United States.[44] The second type, generally referred to as deportable aliens, are those who have gained admission to the United States as resident aliens but have not, at the time of deportation, qualified for naturalization.[45] Though this Comment addresses the indefinite detention of deportable aliens, understanding the nature of excludable aliens and their rights is important: many of the courts' rulings on the issue of the detention of deportable aliens followed an examination of cases dealing with the indefinite detention of excludable aliens.[46]

B. The Right to Due Process of Law

To understand the controversy that arises in cases involving the continued detention of deportable aliens, one must also understand

44. *See* 8 U.S.C. § 1182 (defining which aliens are deemed excludable). Though these aliens are considered ineligible for admission into the United States, many of them are nevertheless allowed to remain in the United States pending deportation to their countries of origin. Though these aliens "may physically be allowed within [the] borders [of the United States] pending a determination of admissibility, [they] are legally considered to be detained at the border and hence as never having effected entry into this country." Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1440 (5th Cir. 1993). This situation is commonly referred to as the "entry fiction." *Id.*; *see also* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc).

The Supreme Court summarized the history of the entry fiction in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The Court wrote:

> Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute it authorized . . . aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore "shall not be considered a landing" nor relieve the vessel of the duty to transport back the alien if ultimately excluded. And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border.

Id. at 215 (citations omitted).

45. *See* 8 U.S.C. § 1227 (defining which aliens are deemed deportable).

46. With respect to excludable aliens, the general consensus of the courts is that these aliens can, without a violation of their constitutional rights, be detained indefinitely pending deportation. *See Shaughnessy*, 345 U.S. at 215 (1953) ("[W]e do not think that respondent's exclusion deprives him of any statutory or constitutional right."); *Gisbert*, 988 F.2d at 1442 ("We hold that the continued INS detention of prisoners is not punishment and does not constitute a violation of the aliens' rights to substantive due process."); s*ee also* Chi Thon Ngo v. INS, 192 F.3d 390 (3d Cir. 1999); Guzman v. Tippy, 130 F.3d 64 (2d Cir. 1997); *Barrera-Echavarria*, 44 F.3d at 1441. *But see* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

the guarantee of due process of law set forth in the Constitution, as it relates to both United States citizens and foreign-born aliens.

1. Due process—generally

The Fifth and Fourteenth Amendments to the Constitution prohibit the deprivation of "life, liberty, or property, without due process of law."[47] Due process analysis has two parts or components: substantive due process and procedural due process.[48]

a. Substantive due process. In general, "[s]ubstantive due process prevents the Government from interfering with rights implicit in the concept of ordered liberty or engaging in conduct that 'shocks the conscience.'"[49] Further, substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[50] One such fundamental liberty interest is that of being free from physical detention.[51] "When substantive due process rights are properly invoked, they guard against certain government intrusions into the private sphere regardless of the fairness of the process employed by the government."[52]

b. Procedural due process. The second component of due process, termed procedural due process, "ensures that government action depriving a person of life, liberty or property is implemented in a fair manner."[53] As one would expect, "[t]he constitutional sufficiency of procedures provided in any situation . . . varies with the circum-

47. U.S. CONST. amend. V.

48. "Substantive and procedural due process claims must be supported by an underlying liberty interest. A liberty interest can arise in one of two ways: (1) from the Due Process Clause itself; or (2) from a state or federal statute." Ho v. Greene, 204 F.3d 1045, 1058 (10th Cir. 2000) (citations omitted). Any analysis of due process claims must necessarily start with a "careful description of the asserted right." Reno v. Flores, 507 U.S. 292, 302 (1993).

49. Cholak v. United States, No. 98–365, 1998 U.S. Dist. LEXIS 7424, at *17 (E.D. La. May 18, 1998) (citation omitted); *see also* Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

50. *Flores*, 507 U.S. at 301–02 (emphasis in original).

51. *See Ho*, 204 F.3d at 1062 ("Liberty is one of those basic rights enjoyed by all 'persons,' as '[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.'" (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)) (dissenting opinion).

52. Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 157 (D.R.I. 1999).

53. *Cholak*, 1998 U.S. Dist. LEXIS 7424, at *17–18.

stances."[54] In determining whether a particular procedure affords an individual procedural due process,

> [a] Court must review the existing procedural framework, then consider "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures."[55]

When the procedures implemented by government to restrict a person's liberty are unfair, a court will strike those procedures down as a violation of the right to procedural due process. With respect to restrictions on physical liberty, whenever any person is to be detained for any reason, both elements of due process must be met. Otherwise, the detention is unconstitutional.[56]

2. Due process—aliens

Aliens can claim some constitutional protections. Under Supreme Court jurisprudence, all persons within the territory of the United States are entitled to due process of law, including aliens.[57] Indeed, "[a]liens, both legal and illegal, are entitled to due process."[58] An alien's right to due process of law is the most significant check on the executive branch's plenary power over aliens.[59] But while aliens are entitled to the protections of the Due Process Clause, it is clear that they do "not enjoy the full panoply of rights enjoyed by United States citizens."[60] Indeed, "Congress regularly makes rules [for non-citizen aliens] that would be unacceptable if

54. Landon v. Plasencia, 459 U.S. 21, 34 (citing Lassiter v. Department of Soc. Serv., 452 U.S. 18, 24–25 (1981)).

55. Phan v. Reno, 56 F. Supp. 2d 1149, 1156 (W.D. Wash. 1999) (quoting *Plasencia*, 459 U.S. at 34 (1982)).

56. *See infra* Part II.C.2.

57. Wong Wing v. United States, 163 U.S. 228, 238 (1896); *see also* United States v. Balsys, 524 U.S. 666, 671 (1998); *Plasencia*, 459 U.S. at 32–33; Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953).

58. *Cholak*, 1998 U.S. Dist. LEXIS 7424, at *18 (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976); Plyler v. Doe, 457 U.S. 202, 210 (1982)).

59. *See* Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 156 (D.R.I. 1999) ("[T]he power of executive branch officers to detain aliens pending deportation pursuant to a statutory grant of authority is not without limits. This power, like most powers of government, is subject to the counter-weight of due process.").

60. *Id.*

applied to citizens."[61] The issue that courts must face, and on which they often differ in the deportation context, is the specific nature of the rights belonging to excludable, resident, and deportable aliens respectively.

a. Rights of excludable aliens. Under the "entry fiction,"[62] excludable aliens "are legally considered to be detained at the border and are thus not entitled to due process protection."[63] As such, "the Due Process Clause affords an excludable alien no procedural protection beyond the procedure explicitly authorized by Congress, nor any 'substantive right to be free from immigration detention.'"[64] Indeed, the long-term detention of excludable aliens pending deportation is generally considered allowable.[65]

b. Rights of resident aliens. Resident aliens, or those who have been admitted to the United States, have significantly more rights than excludable aliens; for "[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[66] This means that resident aliens are, unlike excludable aliens, entitled to the due process protections guaranteed by the Fifth Amendment,[67] though not to the extent enjoyed by full citizens of the United States.

c. Rights of deportable aliens. As the above discussion shows, it is well-established that while excludable aliens have some constitutional rights, those rights are fewer in number and lesser in degree than any belonging to citizens of the United States. It is also generally accepted that resident aliens have more significant rights than excludable aliens, such that they are given protections of substantive and procedural due process that excludable aliens are not given.[68] The is-

61. *Diaz*, 426 U.S. at 80; *see also* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (holding that a state can exclude resident aliens from basic government functions without violating the Constitution).

62. *See supra* note 44.

63. Phan v. Reno, 56 F. Supp. 2d 1149, 1153 (W.D. Wash. 1999) (citing Landon v. Plasencia, 459 U.S. 21, 32–33 (1982); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc)).

64. *Phan,* 56 F. Supp. 2d at 1154 (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)) (alteration in original).

65. *See* Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1448 (5th Cir. 1993).

66. *Plasencia*, 459 U.S. at 32.

67. *See* Ho v. Greene, 204 F.3d 1045, 1061 (10th Cir. 2000) (dissenting opinion).

68. *See Plasencia*, 459 U.S. at 32–33; *Gisbert*, 988 F.2d at 1442 n.8. The Supreme Court has, in a number of cases, addressed the procedural due process rights guaranteed to deportable aliens during the process of determining whether or not deportation is in order. *See*

sue that arises—an issue on which the courts disagree—is the extent of rights belonging to deportable aliens, or aliens who were once resident aliens but have since been slated for deportation. Some courts have held that these aliens retain all of the rights that they enjoyed as resident aliens until they are physically removed from the country, while others feel that once an order of deportation is finalized, the rights that these aliens enjoyed as residents disappear.[69] Again, this Comment will address this issue and the views of the respective courts that have addressed it.

C. Government Interest in Detention of Certain Persons

Also important for the purposes of this Comment are (1) the law of the United States regarding detention; (2) the government's interest in the detention of certain persons; and (3) the way in which due process interacts with detention.

1. Government interest in detaining certain persons

As one court wrote, "[d]etention is a deprivation of liberty."[70] Indeed, "freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action.'"[71] "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[72] This interest in freedom from restraint is not, however, sacrosanct and untouchable. The government can, so long as certain requirements are met, detain individuals for the good of the nation, even when no crime has been committed.[73] For example, the gov-

Plasencia, 459 U.S. at 32–33; Bridges v. Wixon, 326 U.S. 135, 153–54 (1945); The Japanese Immigrant Case, 189 U.S. 86, 100–01 (1903). These cases do not, however, address the nature of an alien's procedural due process rights following the actual entry of an order of deportation.

69. *See infra* Part III.B.1.

70. Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1110 (S.D. Cal. 2000).

71. Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

72. United States v. Salerno, 481 U.S. 739, 755 (1987).

73. *See* Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 157 (D.R.I. 1999). Specifically, the government can only detain a person when that detention serves to meet a narrowly tailored and compelling government interest. Additionally, the detention must not exceed the scope of that narrowly tailored interest. *See* Phan v. Reno, 56 F. Supp. 2d 1149, 1154–55 (W.D. Wash. 1999) ("[A] deprivation will comport with due process only if it is narrowly tailored to serve a compelling government interest. . . . This requires the Court . . . to ask

ernment has a regulatory interest in community safety and may, in certain circumstances, "detain individuals whom the Government believes to be dangerous."[74] Further, when the government has an interest in securing an individual's presence at a particular time and place, detention may be appropriate when the person is unlikely to appear as requested.[75] In sum, whether detention is a violation of a detainee's constitutional rights depends, in large part, on the purpose of that detention.[76]

Courts have a duty to protect against unwarranted and unconstitutional detention. The Southern District of California described the process courts use in making these determinations in *Nguyen v. Fasano*:[77]

> In detention cases, to determine whether a deprivation of liberty is impermissible punishment or permissible regulation, the court must examine whether the deprivation of liberty is imposed for the purpose of punishment or in furtherance of regulatory goals; and if in furtherance of regulatory goals, whether the deprivation is excessive in relation to the purpose for the deprivation.[78]

In the case of the detention of unwanted deportable aliens, courts must decide if the detention "is excessive in relation to the

whether the detention is based upon 'permissible' regulatory goals of the government and, if it is, whether the detention is excessive in relation to those goals.") (citations omitted). *See also* Vo v. Greene, 63 F. Supp. 2d 1278, 1284 (D. Co. 1999) ("When determining whether detention serves a compelling government interest, [one] should first decide 'whether the detention is imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental purpose.'" (quoting Gilbert v. United States Attorney General, 988 F.2d 1437, 1441 (5th Cir. 1993)).

74. *Salerno*, 481 U.S. at 748. With respect to particular situations in which a person deemed to be dangerous was permitted to be detained, *see* Ludecke v. Watkins, 335 U.S. 160 (1948). *See also* Schall v. Martin, 467 U.S. 253, 281 (1984) (permitting pre-trial detention of juvenile delinquents considered to be dangerous); Carlson v. Landon, 342 U.S. 524, 537–42 (1952) (permitting the detention of potentially dangerous aliens pending deportation).

75. *See* 18 U.S.C. § 3142(e) (1994) ("[I]f, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required . . . he shall order the detention of the person prior to trial."). *See also* Bell v. Wolfish, 441 U.S. 520, 535–40 (1979) (permitting the detention of an accused pending trial where the accused presented a risk of flight).

76. *Phan*, 56 F. Supp. 2d at 1154–55 ("[T]he Court [is required] to consider the constitutionality of the detention in light of its purpose . . . ."); *see also Salerno*, 481 U.S. at 747 ("To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we must first look to legislative intent."); *Schall*, 467 U.S. at 269.

77. 84 F. Supp. 2d 1099 (S.D. Cal. 2000).

78. *Id.* at 1110.

purpose for the deprivation."[79] "Such a determination is highly dependent on the unique facts of each case."[80]

2. Detention and due process

While the government does have an interest in detaining certain persons, that detention can, at some point, become a violation of due process, though it was not such a violation to begin with.[81] As one court wrote, "If a substantive due process violation is to be found in the practice of detention . . . it can only be based upon a finding that the detention under a particular set of factual circumstances is excessive in relation to the governmental purposes behind the restriction in [a] particular context."[82]

D. The Detention of Unwanted Aliens

It is a longstanding rule that "[t]he government's interest in efficient administration of the immigration laws at the border . . . is weighty."[83] As such, Congress has given the INS power to detain aliens pending deportation.

1. The purpose of detaining aliens—generally

The purpose of detaining aliens is three-fold. First and foremost, detention advances the government's interest in "ensuring the re-

79. *Id.*; *see also Schall*, 467 U.S. at 269. In *Phan v. Reno*, the Western District of Washington expounded on this procedure, arguing that strict scrutiny review was required in these cases. The court wrote:

> As a general rule, government invasions of fundamental liberty interests are subject to strict scrutiny review: a deprivation will comport with due process only if it is narrowly tailored to serve a compelling government interest. Applying this standard of review in detention cases, courts consider whether the detention is "imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental interest." This requires the Court to consider the constitutionality of the detention in light of its purpose, and to ask whether the detention is based upon "permissible" regulatory goals of the government and, if it is, whether the detention is excessive in relation to those goals.

Phan, 56 F. Supp. 2d at 1154–55 (quoting Gilbert v. United States Attorney General, 988 F.2d 1437, 1441 (5th Cir. 1993); *see also In re* Indefinite Detention Cases, 82 F. Supp. 2d 1098, 1100 (C.D. Cal. 2000).

80. Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 159 (D.R.I. 1999).

81. *See id.* at 158–59.

82. *Id.* at 159.

83. Landon v. Plasencia, 459 U.S. 21, 34 (1982).

moval of aliens ordered deported."[84] Second, "detention helps to guarantee reliable and speedy deportation by preventing the alien from absconding during the pendency of the deportation proceedings."[85] Third, with respect to aliens such as Zadvydas, the "detention of an alien who has been convicted of an aggravated felony furthers the government's efforts to protect the community from criminal behavior."[86] All three of these interests are legitimate and satisfy the permissibility standard set forth by the Supreme Court in *United States v. Salerno*,[87] meaning they provide the government with the legitimate interest necessary to impose detention on certain persons.

2. Due process and the detention of aliens

Courts have agreed on the proposition that immigration detention is not punishment but "is merely an administrative incident to the civil deportation process;"[88] therefore, it does not violate due process guarantees under the Constitution.[89] That detention can, however, become a violation if it ever goes beyond the interest that the government has in detaining the alien.

With respect to the detention of aliens, "consideration of several factors [has] been identified by federal courts as relevant to . . . an examination"[90] of whether due process has been violated in this

84. Phan v. Reno, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999).

85. *Hermanowski*, 39 F. Supp. 2d at 159 (citation omitted).

86. *Id.*

87. *See Phan*, 56 F. Supp. 2d at 1156. With respect to these regulatory goals, the *Phan* Court wrote:

> Clearly the government has a legitimate interest in securing the safe removal of aliens. Indeed, this is a primary objective of the INS: to decide which aliens may remain in the United States and which must leave, and to facilitate the safe and expeditious removal of aliens ordered deported. The latter two goals are incidental to this primary objective.

Id.

88. *Hermanowski*, 39 F. Supp. 2d at 158; *see also* Alvarez-Mendez v. Stock, 941 F.2d 956, 962 (9th Cir. 1991); Tran v. Caplinger, 847 F. Supp. 469, 475 (W.D. La. 1993) ("Congress did not provide for detention of aliens convicted of aggravated felonies as a means of punishment.").

89. Immigration detention imposed for the purpose of punishment beyond that meted out by the criminal courts is, without a doubt, a violation of due process. *Hermanowski*, 39 F. Supp. 2d at 158.

90. *Id.* at 159.

manner. These factors include the length of detention,[91] the likelihood of deportation,[92] the potential length of future detention, the likelihood that release will serve to frustrate the actual deportation of the alien, and the danger the specific alien poses to the community if released.[93] As one court addressing this subject wrote, in making a due process determination, "we must necessarily balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released."[94]

3. Detention of excludable aliens

Though the issue in cases such as Ma's involves the potentially indefinite detention of deportable aliens, courts have in the past addressed the issue of the prolonged detention of excludable aliens.[95] Though the issue is different, understanding the case law regarding the indefinite detention of excludable aliens is important because, in making their decisions on detention of deportable aliens, courts have looked to these earlier cases for guidance.

The seminal case in the area of the potentially indefinite detention of excludable aliens is *Shaughnessy v. United States ex rel. Mezei*,[96] a 1953 Supreme Court decision which dealt with the detention of "an alien immigrant permanently excluded from the United States on security grounds but stranded in [a] temporary haven on Ellis Island because other countries will not take him back."[97] In *Mezei*, the alien in question was seeking a return to the United States after having spent nineteen months behind the Iron Curtain.[98] The Korean War was in progress, and the United States was distrusting of communism and communist-controlled nations. Mezei was seen as a

91. *See* Truong Thanh Tam v. INS, 14 F. Supp. 2d 1184, 1191–92 (E.D. Cal. 1998); United States v. Zadvydas, 986 F. Supp. 1011, 1026–27 (E.D. La. 1997).

92. *See Trunng ThanhTam*, 14 F. Supp. 2d at 1191–92; *Zadvydas*, 986 F. Supp. at 1026–27; Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 793 (D. Kan. 1980).

93. *See Hermanowski*, 39 F. Supp. 2d at 159 (D.R.I. 1999).

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

95. In review, deportable aliens are those who were at one time admitted into the United States as permanent residents, but have since been ordered deported. Excludable aliens, in contrast, are those aliens who the United States rejected at the border and deemed unworthy of permanent resident status.

96. 345 U.S. 206 (1953).

97. *Id.* at 207.

98. *See id.* at 208.

security risk;[99] therefore, the Supreme Court held that the continued exclusion and detention of Mezei did not "deprive[] him of any statutory or constitutional right."[100]

Though *Mezei* has, by some courts, been distinguished on its facts—it admittedly dealt with a unique situation—a number of more recent cases have firmly entrenched in federal case law the rule set forth in *Mezei*. For example, in *Gisbert v. United States Attorney General*,[101] the Fifth Circuit Court of Appeals held that "the continued INS detention of [excludable aliens] is not punishment and does not constitute a violation of the aliens' rights to substantive due process."[102] Similarly, in *Guzman v. Tippy*,[103] the Second Circuit stated that the "[i]ndefinite detention of excludable aliens does not violate due process."[104] And finally, the Ninth Circuit Court of Appeals, in its ruling in *Barrera-Echavarria v. Rison*,[105] stated that "[b]ecause excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows."[106]

Again, though this Comment addresses the detention of deportable aliens and not excludable aliens, understanding the rule of *Mezei* and its progeny is important because many courts have looked to that rule to determine whether deportable aliens can be similarly detained without a violation of the Due Process Clause.

4. Detention of deportable aliens

Under the current system, the detention of deportable aliens is permitted by statutory law. Prior to 1996, the former 8 U.S.C. § 1252 permitted the detention. The current law allowing detention is found in 8 U.S.C. § 1231(a), which is supplemented by various subsections of 8 C.F.R. § 241.

99. As one court distinguishing *Mezei* pointed out, "security risks and enemy aliens during wartime have always been treated specially." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981).

100. *Mezei*, 345 U.S. at 215.

101. 988 F.2d 1437 (5th Cir. 1993).

102. *Id.* at 1442.

103. 130 F.3d 64 (2d Cir. 1997).

104. *Id.* at 66.

105. 44 F.3d 1441 (9th Cir. 1995).

106. *Id.* at 1450.

a. 8 U.S.C. § 1252: The prior law. Prior to 1996, aliens ordered deported generally could not be detained pending that deportation for a period of more than six months.[107] "Upon expiration of the six-month period, such aliens had to be released, but they remained subject to the supervision of the Attorney General."[108]

b. 8 U.S.C. § 1231(a): The current law. In 1996, Congress altered the detention provisions of the INA when it enacted the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The AEDPA amended 8 U.S.C. § 1252(a)(2) "to require the Attorney General to take into custody aliens convicted of aggravated felonies, controlled substance offenses, firearms offenses, and other serious crimes upon the release of such aliens from incarceration."[109] The AEDPA also "required the Attorney General to detain such aliens pending their removal from the United States."[110]

Section 1231 of Title 8 of the United States Code, enacted as a part of the IIRIRA, deals with the post-1996 detention and removal of aliens ordered removed by an immigration judge. Of specific importance to this Comment is subsection (a). Section 1231(a)(1) defines what is termed the "removal period." Specifically, this section requires that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days."[111] Section 1231(a)(2) requires the Attorney General to detain all aliens during that ninety-day period.[112] Subsections (a)(3) and (a)(4) address the supervision of aliens released within the United States after the

107. *See* 8 U.S.C. § 1252(c) (1994).

108. Phan v. Reno, 56 F. Supp. 2d 1149, 1151–52 (W.D. Wash. 1999). *See* former 8 U.S.C. § 1252(d) (1994).

109. *Phan*, 56 F. Supp. 2d at 1152.

110. *Id.*

111. 8 U.S.C. § 1231(a)(1).

112. "During the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 1231(a)(2). With respect to § 1231(a)(1) and (2), the *Underdown* court interpreted the law as follows:

> Under . . . 8 U.S.C. § 1231(a)(1) & (2), the Attorney General is required to remove an alien from the United States within the "removal period," defined generally as the ninety days beginning when an order of removal becomes administratively final, when any judicial review thereof is completed, or when the alien is released from confinement (other than under an immigration process), whichever is latest, and is required to detain the alien during the removal period.

185 F.3d 279, 287 (5th Cir. 1999).

ninety-day removal period and the removal of aliens imprisoned, arrested, or on parole, supervised release, or probation at the time removal is ordered, respectively. And subsection (a)(5) addresses the reinstatement of removal orders against aliens who have illegally reentered the country.

For the purposes of this Comment, the most important and disputed portion of § 1231 is subsection (a)(6):

> An alien ordered removed who is . . . removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) . . . or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).[113]

Clearly the language of § 1231(a)(6) explicitly permits detention beyond the ninety-day removal period for certain categories of aliens.[114] The question that the courts have had difficulty and dissension addressing involves the permissible length of that post–removal period detention and whether potentially indefinite detention under it would constitute a violation of due process.

c. 8 C.F.R.. §§ 241.1–241.4. Part 241 of Title 8, Chapter I, of the Code of Federal Regulations, which supplements 8 U.S.C. § 1231(a), addresses, among other things, the post-hearing detention and removal of aliens under the 1996 Act. Sections 241.1 through 241.4 are important with respect to the issues addressed in this Comment.

113. 8 U.S.C. § 1231(a)(6).

114. The *Ma* court described the categories of aliens that can and cannot be removed. It wrote:

> Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups. Those in the first group must be released subject to supervisory regulations that require them, among other things, to appear regularly before an immigration officer, provide information to that official, notify INS of any change in their employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with substantial restrictions on their travel. Those in the second group "*may be detained beyond the removal period*" and, if released, shall be subject to the same supervisory provisions applicable to aliens in the first group. Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes).

Ma v. Reno, 208 F.3d 815, 821 (9th Cir. 2000) (quoting 8 U.S.C. §§ 1227, 1231).

Section 241.1 deals with final orders of removal and sets forth six scenarios in which an order of removal made by an immigration judge "at the conclusion of proceedings under section 240 of the Act shall become final."[115] Section 241.2 addresses the procedures for the issuance and execution of a warrant of removal. Section 241.3 addresses the issue of detention of aliens ordered deported during the removal period. It states, in pertinent part, "[o]nce the removal period defined in section 241(a)(1) of the Act begins, an alien in the United States will be taken into custody pursuant to the warrant of removal."[116]

Most important for the purpose of this Comment, § 241.4 addresses the continued detention of aliens beyond the removal period ordered deportation. This section provides:

> (a) *Continuation of custody for . . . criminal aliens.* The district director may continue in custody any alien . . . removable under section 237(a)(1)(c), 237 (a)(2), or 237 (a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States.[117]

Section 241 also provides a way for aliens who fit in any of the above categories to acquire release when the ninety-day removal period expires. The burden of proving appropriate release is placed upon the alien and not the government as it would be in a pre-trial detention setting. In this respect, § 241.4 provides:

> If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal.[118]

115. 8 C.F.R. § 241.1 (2000).

116. 8 C.F.R. § 241.3. Section 236.1(d)(2)(ii) of 8 C.F.R. will allow the alien to "request review by the district director of the conditions of his or her release" after the order of deportation does become finalized.

117. 8 C.F.R. § 241.4.

118. *Id.*

In determining whether an alien's petition for release should be granted, § 241.4 sets forth a non-exhaustive list of factors that he district director may consider.[119]

d. Additional rules. On August 6, 1999, the INS announced additional interim procedures—beyond those contained in the aforementioned C.F.R. sections—related to the detention of aliens whose deportation is unlikely during the ninety-day removal period.[120]

119. These factors include: (1) the nature and seriousness of the alien's criminal convictions; (2) the alien's entire criminal history; (3) the sentence(s) imposed for the conviction leading to removal and the time actually served for the conviction; (4) the alien's history of failures to appear for court; (5) the alien's probation history; (6) the nature of any disciplinary problems that the alien posed while incarcerated; (7) any evidence of rehabilitative efforts or recidivism on the part of the alien; (8) equities in the United States; and (9) the alien's prior immigration violations and history. *See id.*

120. The pertinent parts of these interim procedures, as set forth in their entirety in the Appendix to *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999), are as follows:

> (1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order removal cases *before* the ninety-day removal period mandated by section 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.
>
> (2) These procedures apply to any alien ordered removed who is inadmissible under section 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA section 236(e)(1)–(3), and non-aggravated felon aliens with final orders of exclusion. . . . The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.
>
> (3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. . . . The notice shall specify the factors to be considered and explain that the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.
>
> (4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. . . . The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.
>
> (5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other per-

In conjunction with that announcement, the INS also declared an "intention to promulgate regulations to the same effect."[121]

son at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.

(6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. *See* 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document shall be considered an adverse factor in determining eligibility for release. *See* INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.

(7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. . . . A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

(8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the preliminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.

(9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.

(10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.

(11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

Id. at 400–01.

121. Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1108 (S.D. Cal. 2000).

These interim procedures were set forth by the INS shortly after the publication of the Western District of Washington's decision in *Phan v. Reno*,[122] which essentially held that the continued detention of undeportable deportable aliens under 8 U.S.C. § 1231(a)(6) was, in most cases, unconstitutional.[123] The practical effect of *Phan* was that the INS was required to release a large number of undeportable detainees,[124] and the interim procedures were promulgated to address the substantive and procedural due process concerns expressed by the *Phan* court in an effort to stop the ordered release of so many aliens. Other courts have addressed these issues as well.

III. THE CASES AND THE ISSUES THEY RAISE

As 8 U.S.C. § 1231(a)(6) is a fairly new statute, only a handful of courts have addressed the issue of its constitutionality and otherwise interpreted the statute. These courts are split in their treatment of § 1231(a)(6).

A. Views of the Courts on the Indefinite Detention of Aliens

The courts that have addressed the issue of indefinite detention under 8 U.S.C. § 1231(a)(6) have expressed three different views on the issue. The majority of courts, all federal district courts, have held that the language of § 1231(a)(6) permits indefinite detention of aliens, but such detention is a violation of the alien's right of due process and is therefore unconstitutional. A minority of courts, including two federal circuit courts, have held that the language of § 1231(a)(6) permits the indefinite detention of aliens and that prolonged detention under the statute is both lawful and constitutional. Finally, two courts have invoked the doctrine of constitutional avoidance and concluded that the language of § 1231(a)(6) does not permit indefinite detention at all.

122. 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

123. For a limited look at reaction to the *Phan* ruling, see Alex Tizon, *For INS, A Matter of Time*, SEATTLE TIMES, June 18, 1999, at B1; Patrick McMahon, *Court Clarifies Rights of Immigrant Ex-Cons*, USA TODAY, July 12, 1999, at 7A.

124. *See* Mike Carter & Steve Miletich, *Indefinite Detention by INS Is Illegal*, SEATTLE TIMES, July 10, 1999, at A1 (reporting that in Washington alone, the *Phan* ruling could ultimately force the INS "to release as many as 120 . . . criminal aliens," as well as preclude the prolonged detention of future criminal aliens ordered deported to countries with which the United States has no repatriation agreement).

1. Indefinite detention is permitted by § 1231(a)(6) but is a violation of an alien's right to due process

In the past three years, at least seven United States district courts have held that while the language of 8 U.S.C. § 1231(a)(6) explicitly authorizes the indefinite detention of deportable aliens, such indefinite detention is a violation of those aliens' due process rights.[125] The courts that have addressed the issue of indefinite detention under § 1231(a)(6) constitute the majority view.

One court that held indefinite detention of deportable aliens under the statute unconstitutional was the Western District of Washington in the aforementioned case of *Phan v. Reno*.[126] *Phan* is a unique case in that, though it was decided at the district court level, it was presided over by a group of five district court judges sitting en banc. Additionally, the five judges heard oral arguments not on one case, but on five consolidated cases, and issued a joint order for those five cases.[127]

After setting forth the general background for the case, the *Phan* court addressed the statutory and regulatory framework of 8 U.S.C.

125. These courts are: Kay v. Reno, 94 F. Supp. 2d 546 (M.D. Pa. 2000); Nguyen v. Fasano, 84 F. Supp. 2d 1099 (S.D. Cal. 2000); Sengchanh v. Lanier, 89 F. Supp. 2d 1356 (N.D. Ga. 2000); Hermanowski v. Farquharson, 39 F. Supp. 2d 148 (D. R.I. 1999); Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999); Vo v. Greene, 63 F. Supp. 2d 1278 (D. Co. 1999); United States v. Zadvydas, 986 F. Supp. 1011 (E.D. La. 1997). In addition to these courts, in *In re Indefinite Detention Cases*, 82 F. Supp. 2d 1098 (C.D. Cal. 2000), the Central District of California held that indefinite detention of deportable aliens is unconstitutional without specifically addressing whether § 1231(a)(6) permits that indefinite detention.

126. 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

127. In setting forth its reasoning for handling the cases as it did, the *Phan* court wrote the following:

> More than one hundred habeas corpus petitions are currently pending in the Western District of Washington wherein aliens ordered deported to countries that have refused them admittance challenge the legality of their continued detention by the Immigration and Naturalization Service (INS). In an order dated April 22, 1999, the undersigned judges of the Western District designated five lead cases that present issues common to all petitioners and directed the parties to brief and argue these common issues together; the remaining cases were stayed pending decisions in the lead cases.

Id. The court later added:

> Due to the great number of cases currently pending in this district that raise the same issue, namely whether INS detention of aliens ordered deported to countries that have refused them admittance violates substantive or procedural due process, we recognize the need to adopt a consistent legal framework to guide our individual consideration of these petitions.

Id.

§ 1231(a) and its predecessor, and its accompanying C.F.R. sections. Determining that § 1231(a)(6) did permit the potentially indefinite detention of the aliens before it, the court then addressed the constitutionality of that detention under the Due Process Clause of the Fifth Amendment. In concluding that indefinite detention under the statute was unconstitutional, the *Phan* court wrote:

> [A]s the probability that the government can actually deport an alien decreases, the government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe. Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is "excessive" to detain an alien indefinitely if deportation will never occur.[128]

In reaching this conclusion, the court rejected the INS's argument that the procedures that it had in place at the time were adequate to provide the detained aliens with due process.[129] The court then promised to provide an "expedited review of the remaining petitions . . . stayed pursuant to the April 22nd and June 29th orders."[130]

Another district court decision holding that indefinite detention of deportable aliens is a violation of due process is *Kay v. Reno*,[131] an April 2000 decision handed down by the Middle District of Pennsylvania. *Kay* addressed the detention of Sombat Map Kay, a permanent resident born in Cambodia in 1974. Kay was arrested in 1992 for armed assault, armed robbery, and breaking and entering and was ordered deported in 1996. Distinguishing a Third Circuit Court of

128. *Id.* at 1156.

129. *See id.* at 1157–58. The court also rejected an INS argument that the interest of the petitioner aliens was "the right to be released into the United States pending [their] removal." In response to this argument, the court stated that the issue was "much more basic—it is simply the right to be at liberty." *Id.* at 1154 (citation omitted). The INS also argued that in reviewing the petitioner's cases, "the Court's power to inquire into alleged violations of petitioners' substantive due process rights is limited, and the Court should therefore apply a more deferential standard of review." *Id.* at 1155. The court disagreed, stating that "[w]hile the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention." *Id.* The court instead applied strict scrutiny.

130. *Id.* at 1158.

131. 94 F. Supp. 2d 546 (M.D. Pa. 2000).

Appeals decision in which it was held that excludable aliens can be detained indefinitely pending deportation,[132] the *Kay* court determined that Kay was unlikely to be deported anytime soon and therefore was facing the possibility of indefinite detention.[133] Focusing on the holding in *Phan* and certain provisions of the Bail Reform Act, which governs pre-trial detention, the court determined that the government's interest in detaining Kay was outweighed by both his right to freedom from physical confinement and the potentially lengthy duration of his confinement. Kay's habeas corpus petition was granted and the court ordered that, absent a showing that he was likely to be removed in the foreseeable future, the INS must release Kay from confinement.[134] The holdings in *Phan* and *Kay* are representative of the decisions of the other courts that have held that 8 U.S.C. § 1231(a)(6) permits indefinite detention, but that such detention is a violation of an alien's right to due process.

2. Indefinite detention is permitted by § 1231(a)(6) and is not a violation of an alien's right to due process

While at least seven federal district courts have held that continued detention under 8 U.S.C. § 1231(a)(6), though permissible under the statute, is unconstitutional, at least four courts, including two federal appellate courts, have held otherwise.[135] These courts have held that § 1231(a)(6) does indeed permit indefinite detention and that such detention is not a violation of an alien's right to due process.

The holding in *Ho v. Greene*[136] is representative of the decisions of these courts. In *Ho*, the Tenth Circuit Court of Appeals addressed the habeas petitions of two aliens awaiting deportation in INS detention, one of whom was a permanent resident before being ordered deported. Concluding that "[t]he final removal orders stripped both [aliens] of any heightened constitutional status either may have pos-

132. *See* Chi Thon Ngo v. INS, 192 F.3d 390 (3d Cir. 1999).

133. *See Kay*, 94 F. Supp. 2d at 553.

134. *See id.* at 557.

135. These courts include: Ho v. Greene, 204 F.3d 1045 (10th Cir. 2000); Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999); Villafuerte v. INS, 71 F. Supp. 2d 573 (W.D. La. 1999); and Cholak v. United States, No. 98–365, 1998 U.S. Dist. LEXIS 7424 (E.D. La. May 18, 1998).

136. 204 F.3d 1045 (10th Cir. 2000).

sessed prior to the entry of the final removal order,"[137] the *Ho* court wrote: "The applicable statutes authorize the continued, indefinite detention of both Petitioners. Because Petitioners have no liberty interest in the right they are asserting, their due process claims fail. Consequently, there is no constitutional impediment to Petitioners' continued detention."[138] In making this ruling, the Tenth Circuit rejected the petitioners' arguments that the Attorney General lacks statutory authority to detain aliens indefinitely pending the execution of a final removal order and that, in the alternative, the statute is ambiguous as to the length of detention permitted and, as such, a reasonable time limit should be read into the statute.

In *Zadvydas v. Underdown*, the Fifth Circuit Court of Appeals, addressing the case of Kestutis Zadvydas, reached a similar conclusion supported by a similar argument, holding that "once a resident alien . . . is—concededly in adherence with procedural and substantive due process—ordered deported and that order becomes final, the resident alien may claim no greater rights than an excludable alien in like circumstances."[139] In so holding, the court expressly rejected the petitioner's argument that even after deportation orders have been finalized, resident aliens are entitled to a greater degree of substantive due process protection than excludable aliens. The court also rejected Zadvydas' contention that his detention amounted to nothing more than punishment without trial in contravention of his right to substantive due process and his liberty interest in being free from physical confinement. In sum, both of these decisions stand for the proposition that 8 U.S.C. § 1231(a)(6) permits the indefinite detention of deportable aliens, and that such detention, though possibly indefinite, does not result in a violation of an alien's constitutional right to substantive due process.

3. Section 1231(a)(6) does not permit indefinite detention of aliens

Two courts, the Ninth Circuit Court of Appeals and the Eastern District of California, have applied the doctrine of constitutional avoidance and held that the language of § 1231(a)(6) does not even permit the indefinite detention of unwanted aliens. The doctrine of constitutional avoidance, in brief, requires that courts "interpret

137. *Id.* at 1059.

138. *Id.* at 1060.

139. *Underdown*, 185 F.3d at 285.

statutes in a manner that avoids deciding substantial constitutional questions."[140]

The first court to invoke the doctrine of constitutional avoidance in a § 1231(a)(6) context was the Eastern District of California in *Sok v. INS*.[141] The court that "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." The *Sok* court then held that "[c]onstruing § 1231(a)(6) as vesting the Attorney General with the authority to detain deportable aliens beyond the removal period with no fixed time limitations would raise a serious constitutional question."[142] The court eventually held that "a literal reading of § 1231(a)(6) does not expressly vest the Attorney General with unlimited power to detain."[143]

Six months later, in *Ma v. Reno*, the Ninth Circuit Court of Appeals similarly decided that § 1231(a)(6) does not permit indefinite detention of deportable aliens. In doing so, the *Ma* court employed the doctrine of constitutional avoidance, stressing the importance of construing a statute in a manner that will avoid raising constitutional problems "so long as the saving construction is not 'plainly contrary to the intent of Congress.'"[144] The court wrote:

> We hold that Congress did not grant the INS authority to detain indefinitely aliens who . . . have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which the alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, we conclude that the statute

140. Ma v. Reno, 208 F.3d 815, 822 (9th Cir. 2000); *see also* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Rescue Army v. Municipal Court of L.A., 331 U.S. 549 (1947); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916). For a scholarly discussion on the basics of the doctrine of constitutional avoidance, see Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

141. 67 F. Supp. 2d 1166 (E.D. Cal. 1999).

142. *Id.* at 1168 (citations omitted).

143. *Id.* at 1169.

144. 208 F.3d at 827 (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994)).

> does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.[145]

As the *Ma* court invoked the doctrine of constitutional avoidance, it did not address the issues of substantive or procedural due process as they relate to the detention of aliens under § 1231(a)(6). In sum, these two courts disagreed with a number of other federal tribunals and held that 8 U.S.C. § 1231(a)(6) does not permit the indefinite detention of aliens ordered deported.

B. Other Issues Raised in These Cases

In addition to the issues of whether the Attorney General has statutory authority to detain deportable aliens indefinitely pending deportation and whether that prolonged detention violates the Fifth Amendment to the Constitution, three other significant issues are raised in the aforementioned cases: (1) whether deportable aliens have greater rights than excludable aliens; (2) whether it is fair to require the deportable alien to bear the burden of proving that he or she is not a danger to the community or a flight risk before release into the community to await deportation may be effected; and (3) whether the indefinite detention of deportable aliens violates international law.[146]

1. Do deportable aliens have greater rights than excludable aliens?

The two circuit courts that held that indefinite detention of a deportable alien is not a violation of his constitutional rights did so because, in the view of those courts, "once a resident alien . . . [is] ordered deported and that order becomes final, the resident alien

145. *Id.* at 821–22. In its opinion, the *Ma* court stated that the doctrine of constitutional avoidance has been employed in immigration contexts in the past, giving as examples the following cases: United States v. Witkovich, 353 U.S. 194, 199 (1957) (reading a limitation into a statute which authorized the INS to demand information from deportable aliens—the limitation held that aliens did not have to answer questions that were not relevant to a legitimate governmental purpose); Jean v. Nelson, 472 U.S. 846, 854–56 (1985) (avoiding a constitutional question by holding that an immigration parole regulation does not permit race-based discrimination); Romero v. INS, 39 F.3d 977 (9th Cir. 1994) (reading a limitation into a statute such that an alien who refused to answer questions unrelated to her visa status was protected from deportation).

146. A few cases have also wrestled with whether or not Congress's plenary power extends to post-deportation order detention. *See infra* note 149.

may claim no greater rights than an excludable alien in like circumstances."[147]

In *Underdown*, the Fifth Circuit Court of Appeals gave the following justification for its decision that deportable aliens have no more rights than excludable aliens:

> In the [case of an alien ordered deported because of the commission of a crime], the national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable. When a former resident alien is—with the adequate and unchallenged procedural due process to which his assertion of a right to remain in this country entitles him—finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin. The fact that deportation cannot be immediately effectuated would not seem to recreate a distinction in the government's interest regarding excludable aliens and resident aliens.[148]

Other courts, such as *Phan*, have strongly disagreed. These courts have held that a resident alien's right to substantive due process is not extinguished by a final deportation order. It is retained until actual physical expulsion is effected.[149]

2. Is it fair to put the burden of proof on the alien?

Under 8 C.F.R. § 241.4, an alien held past the ninety-day removal period can gain a release if he or she, to the satisfaction of the district directors, "demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk."[150] Courts differ on their views toward the fairness of this procedure—i.e., the fairness of placing the burden of proof on the alien to demonstrate that his or her release will not pose a danger

147. Zadvydas v. Underdown, 185 F.3d 279, 285 (5th Cir. 1999).

148. *Id.* at 296.

149. Related to this argument is another raised by the courts: whether the plenary power of Congress in the immigration realm extends to post-deportation order detention. Some courts, such as *Zadvydas v. Underdown*, clearly believe that it does. *See* 185 F.3d at 294. At least one judge—Justice Brorby of the Tenth Circuit Court of Appeals—disagrees, as evidenced by his dissent in *Ho v. Greene*. *See* 204 F.3d 1045, 1062 n.1 (10th Cir. 2000).

150. 8 C.F.R. § 241.4 (2000).

to the community or a significant risk of flight. For example, in *Nguyen v. Fasano*,[151] the court stated:

> Although there may be other considerations warranting continued detention if a deportation is realistic, the issue here is who bears what burden if deportation is *not* realistic. Where effecting removal is frustrated to such an extent, the petitioner should presumptively be released unless the government can show why he or she should not be released. In such a case, the government should bear the burden of showing that achieving its remaining interests, for example, preventing flight and protecting the community, are not excessive in relation to the restriction of Petitioners' liberty.[152]

Other courts, however, in cases such as *Zadvydas v. Underdown, Zadvydas v. Caplinger*,[153] and *Sengchanh v. Lanier*,[154] though not expressly stating that it is fair to place the burden of proof on the alien, have proceeded to analyze deportation cases under the assumption that there is no unfairness in 8 C.F.R. § 241.4.

3. Does indefinite detention violate international law?

In *Ma*, the Ninth Circuit addressed the issue of the detention of criminal deportable aliens from the point of view of international law, arguing that holding aliens indefinitely is a violation of that law. The court first addressed the relationship between Congressional legislation and international law when it wrote:

> In interpreting the statute to include a reasonable time limitation, we are also influenced by amicus curiae Human Rights Watch's argument that we should apply the well-established *Charming Betsy* rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law. We have reaffirmed this rule on several occasions. In *United States v. Thomas*, we explained that we adhere to this principle "out of respect for other nations."[155]

The court next pointed out that international law generally prohibits indefinite detention when it stated: "We recently recognized

151. 84 F. Supp. 2d 1099 (S.D. Cal. 2000).

152. *Id.* at 1111.

153. 986 F. Supp. 1011 (E.D. La. 1997).

154. 89 F. Supp. 2d 1356 (N.D. Ga. 2000).

155. Ma v. Reno, 208 F.3d 815, 829–30 (9th Cir. 2000) (quoting United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990)).

that 'a clear international prohibition' exists against prolonged and arbitrary detention. Furthermore, Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), which the United States has ratified, provides that 'no one shall be subjected to arbitrary arrest and detention.'"[156] Finally, the *Ma* court stated that in the case of deportable criminal aliens, construing the statute in a way that permits indefinite detention of these aliens likely violates the international prohibition on "prolonged and arbitrary detention." It wrote:

> In the present case, construing the statute to authorize the indefinite detention of removable aliens might violate international law. In *Martinez*, we expressed our approval of a district court decision in this circuit holding that "individuals imprisoned for years without being charged were arbitrarily detained" in violation of international law. Given the strength of the rule of international law, our construction of the statute renders it consistent with the *Charming Betsy* rule.[157]

Thus, the court urged, international law prohibits the indefinite detention of aliens such as Kim Ho Ma and Kestutis Zadvydas.

IV. ANALYSIS

Under the current state of the law, it is unclear which of the above views on the indefinite detention of deportable aliens is the most correct. Indeed, courts on all sides of the issue have freely admitted that there is no strong Supreme Court authority that directly supports their views.[158] While a clear answer will not be available until the Supreme Court addresses the issue, a look at the law currently in existence demonstrates that the view set forth by *Zadvydas v. Underdown* and *Ho v. Greene* is the proper view. To put it another way, a look at the law as outlined by Congress and the Supreme Court fa-

156. *Id.* at 829 (quoting Martinez v. Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998); International Covenant on Political and Civil Rights, *opened for signature*, Dec. 19, 1966, 99 U.N.T.S. 171, *entered into force*, Mar. 23, 1976, at Art. 9(1)) (footnote omitted).

157. *Id.* (quoting *Martinez*, 141 F.3d at 1384).

158. For example, after addressing a string of Supreme Court cases regarding the right of the United States to deport aliens, the *Zadvydas v. Underdown* court offered a lack of authority as support for its holding: "Nothing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien." 185 F.3d 279, 295 (5th Cir. 1999).

vors the view that there is no violation of the Fifth Amendment when deportable aliens are detained pending deportation past the statutory ninety-day removal period, even when that period of detention appears to be unlikely to end in the near future.

Specifically, there is support in the law for the proposition that deportable aliens have no greater due process rights than those excludable aliens who the Supreme Court says can be detained indefinitely. Additionally, allowing the release of deportable aliens into the United States is a direct violation of federal constitutional law. Finally, international law does not require the release of these aliens, and the interim procedures promulgated by the INS in August of 1999 provide more than enough substantive and procedural due process protections to satisfy the established standards. On these grounds, a conclusion that deportable aliens can be held well past the ninety-day removal period is constitutionally sound.

A. The Government's Interests in Detaining a Deportable Alien Are the Same as Those in Detaining an Excludable Alien

Though some courts disagree that after an order of deportation has been entered the rights and interests of deportable aliens are the same as those belonging to excludable aliens, it is apparent that, under the law, the rights of these respective groups of aliens are in fact the same. It is also apparent that once a deportation order is entered, the government's interest in pre-deportation detention of a deportable alien is the same interest that it has in the detention of an excludable alien. Consequently, it is unreasonable to assume that the same government interest will require different results when applied to excludable and deportable aliens who enjoy the same constitutional rights.

Before deportation, a resident alien has a presumptive right to be at large within the borders of the United States. An excludable alien, on the other hand, has no such right or expectation, only a hope of entering the borders of the nation. An order of deportation, however, strips a resident alien of the right to be at large within the United States.[159] Once a deportation order has been entered, then,

159. This proposition is supported by statutory and case law. For instance, 8 C.F.R. § 1.1(p) states:

> The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing permanently in the United States as an

with respect to the right to enter or remain in the United States, the deportable alien has no greater right or claim to entry than an excludable alien ordered removed. For example, when Kim Ho Ma became a resident alien, he gained the rights enjoyed by all resident aliens, namely the right to both procedural and substantive due process under the Fifth Amendment, as well as the right to be free within the borders of the United States. When the government initiated deportation proceedings against him, Ma was guaranteed due process protections during those proceedings, and there is no contention that these rights were violated. Once the deportation order was entered, however, Ma lost the right to be free within the United States, and as such was similar to an excludable alien ordered excluded from the United States. At that point, neither Ma nor an excludable alien had any right to remain within the borders of the United States.

Additionally, once an order of deportation has been entered, the government's interest in removing the individual from the United States is the same, regardless of whether the alien is deportable or excludable. As one court put it:

> In the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable. When a former resident alien is—with the adequate and unchallenged procedural due process to which his assertion of a right to remain in this country entitles him—finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin. . . . Whether the party to be deported is an excludable or a former resident, the United States has properly made its decision and earnestly wishes—if for no other reason than to save the cost of detention—to deport the detainee.[160]

immigrant in accordance with the immigration laws, such status not having changed. *Such status terminates upon entry of a final administrative order of exclusion or deportation.*

(second emphasis added). In the case of aliens such as Zadvydas and Ma, 8 C.F.R. § 1.1(p) means that status as a resident alien disappears upon the entry of an order of deportation.

160. *Underdown*, 185 F.3d at 296 (citation omitted).

The United States Supreme Court expressed a similar sentiment when it wrote that the "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 power."[161] In this context, the government's interests include protecting the nation from recidivism and preventing aliens from absconding, as well as ending an ongoing violation of immigration laws.[162] This is true whether the alien is being held as excludable or deportable.

In sum, the government's interest in both deportation and exclusion contexts is the protection of United States citizens and efficient administration of United States immigration laws, both of which are legitimate, narrowly tailored interests that permit detention of aliens. Similarly, excludable and deportable aliens stand in the same position—both lack a right to be free within the borders of the United States and enjoy only a general right to be free from detention. The United States Supreme Court has decided that those lacking a right to be free within the United States can be detained when they present a danger to the community or a risk of flight,[163] meaning that detaining these individuals, whether deportable or excludable, is permissible.

In the cases presented above, some aliens have argued that the right they are trying to assert is not the right to be free in the United States, but the right to be free from detention. In the context in which the aliens are seeking release, however, this is a distinction without a difference. To release the aliens from detention is to release them back into the United States—as they, by the very nature of their undeportable status, cannot be released elsewhere—which is a violation of federal law.[164] Regardless, once the deportation order is entered, the aliens are left in identical positions, and the right to deprive them of physical liberty is identical. As Part II(D)(3) of this Comment indicates, the law is clear that, in this situation, detention is permissible.

161. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1892) (emphasis added).

162. *See infra* Part IV.B.

163. *See supra* Part II.D.3.

164. *See infra* Part IV.B.

A number of courts have attacked the above reasoning, set forth primarily in *Underdown*, as unsound.[165] However, the defenses that they give for doing so are as suspect as they claim the *Underdown* reasoning to be. For example, in *Nguyen v. Fasano*,[166] the Southern District of California wrote:

> This court is not persuaded that excludable and deportable aliens should be treated identically. "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." For example, an alien being deported has several rights that an alien being excluded does not, including designating the country of deportation, the possibility of departing voluntarily, and the ability to seek suspension of deportation. The reason excludable aliens do not enjoy most constitutional rights is the "entry fiction": "because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows." Permanent resident aliens, on the other hand, have already been admitted to the country and are therefore "present on United States territory." This court is not persuaded by the Fifth Circuit's conclusion in *Zadvydas* that a final order of deportation erases any rights a permanent resident alien previously possessed. "[G]iven that resident aliens have acknowledged constitutional rights, we cannot make those rights vanish by the legal expedient of a final order of deportation."[167]

While the *Nguyen* court makes some good points, its argument is ultimately untenable. For example, one of the *Nguyen* court's main supports for its argument that deportable aliens have rights different from those belonging to excludable aliens is the fact that, in its view, "an alien being deported has several rights that an alien being excluded does not, including designating the country of deportation, the possibility of departing voluntarily, and the ability to seek suspension of deportation." However, a close look at the United States

165. The most oft-cited pro-release decision, *Phan*, did not address the issue in any significant detail, but simply assumed that the rights of deportable aliens to due process protection continued with them until actual physical deportation was effected. The court stated: "No authority supports the government's position that aliens somehow 'assimilate' to excludable status once they have been ordered deported, thereby relinquishing their constitutional rights." Phan v. Reno, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999).

166. 84 F. Supp. 2d 1099 (S.D. Cal. 2000).

167. *Id.* at 1109–10 (citations omitted).

Code shows that this is, to some degree, a false premise. To begin with, the *Nguyen* court broadly states that deportable aliens have the right to depart voluntarily. This is true, but not as true as the court intimates. For instance, under 8 U.S.C. § 1229c (a)(1), not all deportable aliens can voluntarily depart. That section states:

> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, *if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.*[168]

For the purposes of this Comment, it is important to note that those aliens who cannot voluntarily depart, namely aliens deportable under §§ 1227(a)(2)(A)(iii) and 1227(a)(4)(B), are many of the same aliens that the Attorney General is authorized to hold past the ninety-day removal period.[169] Thus, the court is incorrect when it intimates that all of the aliens being held past the ninety-day period have rights to voluntary departure that excludable aliens do not. Additionally, while excludable aliens do not have the right to "voluntary departure," § 1229c (a)(4) plainly states that "[n]othing in this paragraph shall be construed as preventing [an excludable] alien from withdrawing [his or her] application for admission in accordance with section 1225(a)(4) of this title."[170] Thus, the practical effect of the code is that at least some excludable aliens do have the right to voluntarily cease efforts to enter the United States, and thereby depart the country voluntarily. These excludable aliens can withdraw their application and physically return to their countries of origin. Deportable aliens can agree not to remain in the United States and physically return to their countries of origin. Either way, the decision to not remain in the United States is voluntary, meaning from a practical standpoint, both groups of aliens enjoy the same right to "voluntary departure." It is clear, then, that the *Nguyen* court was not wholly correct when it made the broad assertion that deportable aliens have the right to depart voluntarily when excludable aliens do not.

168. 8 U.S.C. § 1229c (a)(1) (1994) (emphasis added).

169. 8 U.S.C. § 1231(a)(6) permits, at the discretion of the Attorney General, the continued detention of aliens "removable under section[s] . . . 1227(a)(2), [and] 1227(a)(4)."

170. 8 U.S.C. § 1229c (a)(4).

The *Nguyen* court also premises its holding that excludable and deportable aliens do not share the same rights on the fact that, in its view, deportable aliens have the right to designate the country to which they will be deported while excludable aliens do not. While this is true, it is well established that a deportable alien does not have a right to be deported to the country of his choice or not be deported at all. As the case of Kestutis Zadvydas demonstrates, the United States will seek to deport an alien to any country, within reason, that will take him or her.[171] The fact that an alien wants to be deported to Germany, for example, does not mean that deportation to Lithuania is precluded when Germany refuses to take the alien in question. Additionally, it is important to note that the right to record a non-binding preference for which country an alien will be deported to is a far cry from the fundamental liberty interests protected by the Fifth Amendment. The fact that an alien has been given the right to voice an opinion as to where he or she would like to end up is not so intertwined with due process that the second necessarily accompanies the first. Again, the *Nguyen* court's reasoning—and basis for its decision that detaining an alien well past the removal period is unconstitutional—is seriously flawed.

In sum, there is simply no convincing authority to support the proposition that a deportable alien retains the full panoply or rights he or she enjoyed prior to the order after a finalized order of deportation is entered; in fact, there is strong authority to support a theory that the opposite is true. Again, this situation may always be unclear until it is addressed directly by the Supreme Court, but the weight of existing authority shows that it is reasonable to find that deportable aliens stand in the same position as excludable aliens, and just as reasonable to conclude that, like excludable aliens, deportable aliens can be held in INS custody for prolonged periods of time.

B. To Release Deportable Aliens into the United States Makes a Mockery of the Constitution and Creates a Violation of Federal Law

To release deportable aliens back into the community when deportation is not possible within the ninety-day removal period also makes a mockery of the deportation process, the United States' immigration laws and procedure, and ultimately the Constitution of the

171. In the case of Zadvydas, the INS has looked to at least four different nations as possible destinations for Zadvydas.

United States. For example, when an alien is ordered deported, he or she loses the right to be at large within the borders of the United States. However, if that alien is released from prison and allowed back into the community until a deportation that may never occur is effected, he or she "will be awarded the very right denied them as a result of the final orders of removal."[172] Such a result would, for all intents and purposes, make ineffective the final order of removal. The same would also force the United States to "violate its national sovereignty"[173] and would, at first in theory but later in practice, cause the United States to lose control of its right to exclude and ultimately the right to control its borders.[174]

Furthermore, to release deportable aliens back into the community results in a direct violation of the law as established by the Supreme Court. In *INS v. Lopez-Mendez*,[175] the United States Supreme Court held that "[t]he purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."[176] By this statement the Court means that an alien ordered deported violates United States immigration laws by remaining in the United States. The Court later reaffirmed this position in *Reno v. American-Arab Anti-Discrimination Committee*,[177] in which it held that "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law."[178] The release of deportable aliens into the borders of the United States, after they have been ordered deported, then, "is thus a continuing violation of the immigration laws."[179]

Neither the violation of federal law nor the invalidating of an order of deportation is desirable or supportive of Congress's constitutional right to "establish an uniform Rule of Naturalization. . .throughout the United States."[180] Indeed, to release aliens who have been ordered deported back into the United States effec-

172. Ho v. Greene, 204 F.3d 1045, 1058 (10th Cir. 2000).

173. Villafuerte v. INS, 71 F. Supp. 2d 573, 576 (W.D. La. 1999) (citing Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1447 (5th Cir. 1993)).

174. *See* Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984), *aff'd* 472 U.S. 846 (1985).

175. 468 U.S. 1032 (1984).

176. *Id.* at 1039.

177. 525 U.S. 471 (1999).

178. *Id.* at 491.

179. Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999).

180. U.S. CONST. art. I, § 8, cl. 4.

tively denies Congress the right to exclude unwanted aliens, and does so in contravention of Article I of the Constitution.[181]

C. International Law Does Not Require the Release of Deportable Aliens

As the *Ma* court explained, international law generally prohibits the prolonged detention of deportable aliens such as Zadvydas and Ma. While the United States does generally seek to abide by international law, with respect to the interpretation of 8 U.S.C. § 1231(a)(6), international law, contrary to the *Ma* court's thinking, has no controlling weight and, in fact, does not even apply.

In *Gisbert v. United States Attorney General*,[182] a case involving the prolonged detention of an excludable alien, the Fifth Circuit Court of Appeals addressed the applicability of international law to the detention of aliens unwanted in the United States. The court wrote:

> Public international law has been incorporated into the common law of the United States, and we are thus bound to construe the federal common law, to the extent reasonably possible, to avoid violating principles of public international law. Public international law controls, however, *only* "where there is no treaty and no controlling executive or legislative act or judicial decision . . . ."[183]

Other decisions, including decisions of the United States Supreme Court and, interestingly enough, the Ninth Circuit Court of Appeals—the court that stated in *Ma* that international law dictates a ruling against continued detention—support and accept this principle of executive and legislative priority.[184]

181. Some aliens have argued that the fact that the Attorney General has discretion to release them from detention when it is determined that they are no longer a danger or a risk of flight necessarily gives them a liberty interest in being free within the United States. As the *Ho* court pointed out in a footnote, there is no clear authority stating that such a situation creates a liberty interest. *See* Ho v. Greene, 204 F.3d 1045, 1060 n.9 (10th Cir. 2000). In support of this proposition, the *Ho* court references *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), which held that no liberty interest was created by a statute that allowed a decision-maker to deny requested relief with unfettered discretion.

182. 988 F.2d 1437 (5th Cir. 1993).

183. *Id.* at 1447 (quoting Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986) (emphasis added).

184. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450–51 (9th Cir. 1995); Committee of U.S. Citizens Living in

As was the case in *Gisbert*, the detention of deportable aliens under 8 U.S.C. § 1231(a)(6) involves federal executive, legislative, and judicial decisions that supersede principles of international law. The provisions of § 1231(a)(6) granting the Attorney General the right to detain certain aliens past the ninety-day removal period involved a decision by the legislative branch of the federal government to permit such detention. Further, the Attorney General's actions in drafting and following the guidelines found in 8 C.F.R. § 241.4 to effectuate this detention under the statute involve decisions of the executive branch.[185] On these grounds the aforementioned section of *Gisbert* holds that international law, while persuasive, is not mandatory precedent in this case, nor does it require courts to refuse to follow the law as set forth by Congress.

D. The August 6, 1999, Interim Procedures Protect the Rights of Deportable Aliens to the Degree that Detention Does Not Offend Due Process

Though, as this Comment argues, the continued detention of deportable aliens past the ninety-day removal period does not result in a violation of an alien's right to due process, the interim procedures promulgated by the INS on August 6, 1999, only solidify the INS's right to detain such aliens without violating the Fifth Amendment. In *Phan*, the court expressed concerns regarding the process of determining when a deportable alien should be released into the community pending deportation. It wrote:

> We have . . . concerns about the quality of the review afforded by the INS to the petitioners. Indeed, our review of the record confirms that the INS does not meaningfully and impartially review the petitioners' custody status. The absence of any individualized assessment or consideration of the petitioners' situations in light of

Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988); Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1453–55 (11th Cir. 1986).

185. Again, 8 C.F.R. § 241.4 states: "The district director may continue in custody any alien . . . removable under section 237 (a)(1)(c), 237 (a)(2), or 237 (a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States." The wording of this section is clear, and cannot be interpreted in a way that would not give the District Director the discretion of holding an alien beyond the end of the removal period. Thus, a decision of the executive branch has gone against a rule of international law, and has therefore made the *Charming Betsy* rule referred to by the *Ma* court inapplicable to this case.

> the pertinent factors set forth in the regulations violates their procedural due process rights. At a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release pending deportation. The immigration judge must actually consider the factors set forth at 8 C.F.R. § 241.4 and explain how they apply to each petitioner's unique circumstances. Petitioners also must be able to appeal any adverse denial of a release request to the BIA.[186]

Ultimately the court concluded that without the enumerated protections, the prolonged detention of unwanted aliens is unconstitutional on due process grounds. The interim procedures, released just one month after the publication of the *Phan* decision, address these concerns and alleviate them by providing the aliens with more substantive and procedural due process protections than they previously enjoyed, enough protections to make continued detention not unconstitutional.[187]

One of the *Phan* court's major concerns involved the absence of an individualized assessment of a petitioner alien's individual situation. The interim procedures address this concern in a number of ways. First, Interim Procedure (1) states that "the District Director will continue to conduct a custody review of administratively final order removal cases *before* the ninety-day removal period . . . expires."[188] Interim Procedure (4) further provides that, after the expiration of the ninety-day removal period, the District Director shall hold an additional review in which "an interview [with the individual alien] is mandatory and the District Director's preliminary decision will be subject to Headquarters review."[189] Thus, this requires that the alien be provided with at least two more instances of personal review than they previously had, including face-to-face contact with a reviewer whose decision can be appealed. Moreover, after the first post-ninety-day interview, "custody reviews [are to be] conducted every six months,"[190] meaning that individualized assessment may continue as long as detention continues.

Another of the *Phan* court's concerns addressed the alien's ability to present evidence to support his or her release from detention

186. Phan v. Reno, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999).

187. *See supra* note 120 for the full text of the procedures.

188. Chi Thon Ngo v. INS, 192 F.3d 390, 400 app. (3d Cir. 1999).

189. *Id.*

190. *Id.*

pending deportation. The interim procedures also address this concern. Specifically, Interim Procedure (3) states that "the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order."[191] Additionally, with respect to the semi-annual reviews following the ninety-day removal period, Interim Procedure (5) states that, when notified of each review, "[t]he alien must be advised that he may submit any information relevant to support his request for release from detention."[192] Thus, there are no restrictions in the interim procedures to an alien's ability to present evidence favorable to himself or herself.

Additionally, the *Phan* court also felt that a reviewing body should specifically "consider the factors set forth at 8 C.F.R. § 241.4 and explain how they apply to each petitioner's unique circumstances."[193] Interim Procedure (1) specifically states that review should be conducted "[p]ursuant to the provisions of 8 C.F.R. § 241.4,"[194] and Interim Procedure (7) states that any "decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision."[195] This third concern, then, is also alleviated by the interim procedures.

Finally, with respect to overall fairness toward the alien, the interim procedures are more than adequate to allow the INS to detain aliens pending deportation without violating the sanctimonious rules of due process, even if that detention appears to be indefinite. Interim Procedure (8), for example, provides that "the District Director's determination that the alien should be detained is to be regarded as only preliminary,"[196] as at least two more INS officials must approve the decision before detention can continue. In the case of disagreement, an entire panel will examine the issue. Clearly, this procedure provides for more than a "summary review by an INS officer"[197] of a particular alien's situation. Additionally, the interim procedures provide for some forgiveness of past transgressions, as Pro-

191. *Id.*
192. *Id.*
193. *Phan*, 56 F. Supp. 2d at 1157.
194. *Chi Thon Ngo*, 192 F.3d at 400.
195. *Id.* at 401.
196. *Id.*
197. Vo v. Greene, 63 F. Supp. 2d 1278, 1287 (D. Colo. 1999).

cedure (6) states that an alien's criminal history "does not create a presumption in favor of continued detention."[198] In sum, the interim procedures are more than fair to those aliens detained past the removal period and are comprehensive enough to allow the INS to determine which aliens it will be safe to release.

In complying with the concerns of *Phan* and making the detention process much more fair to the aliens, the interim procedures provide criminal aliens detained past the ninety-day removal period with greater procedural and substantive due process protections than ever before. This being the case, to release dangerous and recidivist aliens would be to subject the citizens and community of the United States to possible danger when doing so is unnecessary.

V. CONCLUSION

Until the United States Supreme Court undertakes to address the issues presented by these alien deportation cases, the law will continue to be unclear and the courts split. When the Court finally does address the issue, however, it will likely hold that the indefinite detention of deportable aliens is constitutional. The interim procedures announced by the INS on August 6, 1999, clearly address and alleviate the concerns regarding due process that have been expressed by *Phan* and other courts. These procedures provide deportable aliens who have been detained under 8 U.S.C. § 1231(a)(6) with more detailed protections than they enjoyed before the announcement of the procedures. Moreover, the fact that resident aliens ordered deported enjoy no more rights than excludable aliens and in fact stand in the same shoes as excludable aliens, further supports the view that pre-deportation detention is constitutional.

Additionally, as the Fifth Circuit put it in *Underdown*, the "presence [of aliens ordered deported] in this country is . . . a continuing violation of the immigration laws."[199] Further, as the Tenth Circuit held, "[i]f their . . . petitions are granted, [the aliens ordered deported] will be awarded the very right denied them as a result of the final orders of removal, i.e., the right to be at large in the United States."[200] Requiring the INS to release criminal aliens whose deportation is unlikely strips the government of its constitutionally-

198. *Chi Thon Ngo*, 192 F.3d at 401.

199. Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999).

200. Ho v. Greene, 204 F.3d 1045, 1058 (10th Cir. 2000).

guaranteed power to "establish an uniform Rule of Naturalization . . . throughout the United States,"[201] because the government is forced to allow aliens that it wants to exclude to run free, which in turn results in "our losing control over our borders."[202] While considering the due process rights of aliens is important, it is clear that in evaluating deportation procedures, a court's balancing of factors "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative."[203] The right of the government to effectuate its constitutionally guaranteed powers, then, must take precedent over a deportable alien's right to be free.

In conclusion, it is not the purpose of this Comment to argue that all aliens held detained beyond the ninety-day removal period are inherently evil criminals or are more than likely to commit additional crimes upon their release. Nor is it the purpose of this Comment to argue that all aliens detainable beyond the removal period should absolutely be detained, forever if possible. To put it simply, there are a few aliens who, for the good of the nation, need to be detained, and detention should be available in the case of these aliens. To implement the doctrine of constitutional avoidance and hold that there is no detention past the removal period would be to allow these individuals to be set free to the detriment of the nation and in violation of our immigration laws. Similarly, to hold as the *Phan* court did, that prolonged detention is unconstitutional, will lead to an identical result. Prolonged and possibly indefinite detention needs to be an option in order for the INS and the rest of the government to protect the nation, uphold the law, and preserve the powers granted to Congress by the Constitution. Only under such a regime can Congressional power "establish an uniform Rule of Naturalization . . . throughout the United States."[204]

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201. U.S. CONST. art. I, § 8, cl. 4.
202. Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984).
203. Landon v. Plasencia, 459 U.S. 21, 34 (1982).
204. U.S. CONST. art. I, § 8, cl. 4.