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Regarding Indefinite Administrative Detention

Blind patriotism and resounding public support of President Bush’s ‘War’ on terrorism after the events of September 11th have allowed considerable leeway to be taken by the Federal Government in terms of indefinite detention of non-U.S. citizens in Guantanamo Bay, Cuba. But all the flag waving seems to have helped a lot of people dismiss the idea that, even though the detainees taken from Afghanistan in the past year are not U.S. citizens, they remain innocent until proven guilty according to American legal principles.

One might ask: ‘if the suspects haven’t been proven guilty in court (or the remarkably prosecutor-friendly military tribunals), how can they be, for all intents and purposes, imprisoned while innocent (without violating numerous constitutional, statutory, and international laws)?’ The answer is that, because the detainees have NOT been charged with any crime, they are held as enemy combatants. Once deemed a threat to national security by Secretary of Defense Donald Rumsfeld, they are subject to the restrictions of Wartime Internment: “according to the Geneva Conventions, captured combatants may be detained without charges until the end of active hostilities.”(Mariner)

The procedural laws governing detention of aliens lie in a complex net of statutes declaring the rights of the government to detain aliens under different situations. When Donald Rumsfeld says that the end of active hostilities will come “when we feel that there are not effective global terrorist networks functioning in the world” (Mariner), the importance of looking at exactly what the Supreme Court has to say about detention regulations becomes increasingly clear: indefinite detention could very well become life imprisonment.

EXPLANATION OF THE USE OF ZADVYDAS

On a grand scale, the fundamental right of all persons, as guaranteed in the U.S. Constitution, to be protected by the 5th Amendment Due Process clause, which “forbids the Government to "depriv[e]" any "person ... of ... liberty...without due process of law."”(Zadvydas, III(A)) is absolutely crucial to maintaining a fair, evenhanded administration of justice by the U.S. courts system. The U.S. Supreme Court took this into consideration when deciding Zadvydas v. Davis (2001), in which plaintiff argued that a law regulating the lengthy detention process applied to ‘deportable’ aliens whose deportation/reception arrangements were still pending violated his right to Due Process. This will be discussed in depth later. But the case was not based on constitutional issues, rather it focused on statutory laws that define the complex procedures for holding and deporting aliens. Before an analysis of the legal reasoning used to decide Zadvydas can be appropriately understood, one must receive a brief overview of exactly how and why this case applies to Attorney General John Ashcroft’s ability to indefinitely detain ‘suspected terrorists’ at Guantanamo Bay.
The complication here is that the main focus of this case is not on suspected terrorists, prisoners of war, or any issue of national security regarding deportation of enemies of the state. The primary legal question in Zadvydas is “whether 8 U.S.C. §1231(a)(6), a provision permitting the United States Attorney General to detain a deportable alien beyond the 90-day period designated for final removal, authorizes indefinite confinement of that alien or limits such confinement to a reasonable duration.”(Findlaw.com summary of Zadvydas) This is NOT the legal question that will best provide a foundation for understanding the reasoning used in the small part of the majority opinion that gives Ashcroft and Rumsfeld the legal authority to detain suspected terrorists. The court primarily addresses indefinite detention procedures for deportable, permanent resident aliens, so the legal question above addresses the biggest part of Zadvydas' particular case.

To quickly summarize, the case revolves around the problem that both of Zadvydas' countries of origin, Lithuania and Germany, will not receive him as a deportee from the U.S. because he is neither a Lithuanian nor German citizen. In the case of Kim Ho Ma, resolved alongside Zadvydas, the U.S. could not deport Ma to his native Cambodia because the U.S. and Cambodia did not have an active repatriation treaty.(Zadvydas) The Kim Ho Ma portion of Zadvydas, while important to the court, can be ignored for our purposes. The legalistic technicalities that necessitated a Supreme Court decision to resolve these cases are not pertinent to a more tangible, ethically fueled issue like the indefinite detention of suspected terrorists and the moral, political, and legal ramifications thereof. However, when we take a deeper look at the court opinion in Zadvydas, we find that the reasoning behind the case is the justification for potentially unconstitutional detention of non-U.S. citizens. Having established the viability of Zadvydas as a primary source of law governing the topic at hand, while understanding that it’s focus is not necessarily on those regulations directing the detention of aliens at Guantanamo, we can proceed to brief the case and analyze the opinions therein.

**BRIEF OF ZADVYDAS**

In February of 2001, the Supreme Court began hearing arguments in Zadvydas *v. Davis*, the facts of which are as follows. Petitioner Kestutis Zadvydas had been held in custody for just under a year while waiting for deportation, and in 1995 “sought habeas review, pursuant to 28 U.S.C. § 2241, in the United States District Court for the Eastern District of Louisiana.”(Zadvydas, et al) In 1997, he was ordered released based on the complications of his lack of citizenship/repatriation, which rendered his detention in the U.S. “permanent and unconstitutional.” (Zadvydas) The 5th Circuit Court of Appeals then reversed that decision, saying that the detention was not permanent (therefore not unconstitutional) as long as the government persisted in its removal efforts, maintaining a possibility of ending his detention. Petitioner filed a writ of certiorari and the Supreme Court delivered its Opinion on June 28, 2001.

**CASE FACTS**
Petitioner was born to Lithuanian parents in Germany, but was neither a Lithuanian nor German citizen. He later immigrated to the United States, where he accumulated a substantial criminal record including “drug crimes, attempted robbery, attempted burglary, and theft.” (Zadvydas) Petitioner, a deportable alien based on criminal convictions, was held for the 90 day period required by 8 U.S.C. §1231(a)(2) while the deportation procedures were being made. The deportation could not be finalized because neither country of origin was able to repatriate him, as Petitioner was not a citizen in either country. He was then held far longer than the 90 days previously stipulated. This retention is regulated by §1231(a)(6), which provides that “where removal arrangements cannot be finalized within the 90-day period, an alien ordered removed who is… "removable" for violating… the criminal law… or for reasons of security or foreign policy… determined by the Attorney General “may be detained beyond the removal period.”” (Zadvydas) The underlined portion of the statute is precisely the source of contention resolved by the Supreme Court, and, with some complexity, the link between Zadvydas and the detainees in Guantanamo Bay. In addition, the idea of applying Zadvydas to P.O.W. detainees leaves us with TWO legal questions, one regarding the particular court analysis of Zadvydas, and another to be resolved in tandem, applying more directly to detention of those persons deemed a threat to national security.

**LEGAL QUESTION #1**

Does 8 U.S.C. §1231(a)(6), particularly “determined by the Attorney General ‘may be detained beyond the removal period.’”, a law allowing the U.S. Attorney General to detain a deportable alien for more than the 90 days allowed for deportation, permit indefinite detention of that alien, instead of alternatively limiting such detention to a “reasonable duration”? (Zadvydas)

**HOLDING #1**

No, 8 U.S.C. §1231(a)(6) “limits the post removal-period confinement of a deportable alien to a period reasonably necessary to effectuate [said] alien’s removal from the United States”, it does not authorize indefinite detention without criminal charges. (Zadvydas)

**LEGAL QUESTION #2**

Does the holding in Question #1 which, under 8 U.S.C. §1231(a)(6), “limits the post removal-period confinement of a deportable alien to a period reasonably necessary to effectuate [said] alien’s removal from the United States”, also limit preventative detention of those persons designated as terrorists held at Guantanamo Bay (in the interest of national security)?

**HOLDING#2**
No, in ruling ‘No’ in regard to the first legal question, the court limits imposed on detention of aliens does not apply to holding “terrorists or other... circumstances where special arguments might be made for forms of preventive detention... with respect to matters of national security.”(Zadvydas, Majority Op., III (a))

In finding the answers to these two legal questions, we find that there are in fact two destinations for reasoning out the holding in Zadvydas. For the greater portion of the Court Opinion, Justice Breyer explains exactly why Question #1 is answered ‘No’. But the more practical purpose for understanding the legal reasoning here is, as it is the justification for indefinite detention of terrorists, why the answer to the second question is ‘No’. The reasoning for both answers is in fact intertwined in the Majority Opinion through a logical, reasonable interpretation of the law.

RULES OF LAW

The statutes regulating detention are quite clear, however intricate and detailed they may be, in the Zadvydas case. The only ambiguity in the wording of the law in this instance is the word “may” in the last part of 8 U.S.C. §1231(a)(6). The Court held that, “contrary to the Government’s contention, the use of the term “may” ["may be detained beyond the detention period"] in §1231(a)(6) does not bestow “unlimited discretion” upon the Attorney General to effectuate an unjustified continued detention without regard to constitutional rights.”(Zadvydas, B) The rationale behind this assertion is that, had Congress wished to empower the Attorney General with the ability to indefinitely detain aliens without pressing criminal charges, they would have more clearly stated the requirements of the Attorney General to detain those he deems a threat. The court cites similar statutes that more explicitly define the extent of required detention, in which release is the exception. The court, looking at factually similar statutes, draws upon the theme that Congress has imbued within detention law, which defaults to continued detention of deportable aliens only when they are suspected terrorists AND cannot be repatriated to another country. “Compare 8 U. S. C. §1537(b)(2)(C) (1994 ed., Supp. V) ("If no country is willing to receive" a terrorist alien ordered removed, "the Attorney General may, notwithstanding any other provision of law, retain the alien in custody" and must review the detention determination every six months.)"(Zadvydas, B) Even then, the detention is decidedly not indefinite when the purpose of detention is not a matter of national security, but instead a deportation procedure. The court distinguishes deportation procedures from suspected-terrorist detention mainly on a factual basis. In essence, the law limiting detention of deportees in peacetime is independent of Geneva Convention assertions that prisoners of war can be legally held for the duration of the conflict.

In the case of the ‘War On Terrorism’, in which the conflict itself is of an indefinite nature, the court maintains that the interest of national security is worth separating from the limited detention regulations decided in the core of Zadvydas: “The Court's comments suggested that it might uphold the indefinite
detention of suspected terrorists even without the wartime internment justification [provided for Guantanamo Bay detainment]”(Mariner) In this vein, interpreted rules of law are the primary justification for the Opinion in this case, as statutory considerations are the foundation of most immigration law. Unlike constitutional law, statutes provide somewhat extensive definition of procedures regulating many different circumstances, allowing the court to exclude wartime detainment from the limits of 8 U.S.C. §1231(a)(6).

SOCIAL BACKGROUND FACTS

“Relying on the Court’s holding in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Government argued that alien status itself permits indefinite detention. Specifically, because the alien has lost all rights to remain in the country, that alien no longer enjoys constitutional protection.”(Zadvydas, B) The government attempted to establish an alien’s (supposed) inherent lack of constitutional protection as a fact of citizenship (or lack thereof) within modern society, but the Court rejected that argument, saying that an alien who “effected an entry” into the U.S. is protected from “indefinite detention without proper justification.”(Zadvydas, B) The Court establishes that, based on “recognizing the Nation’s need to "speak with one voice" in immigration matters”(Zadvydas, B), efforts must be taken to recognize the Executive Branch/INS’s experience in immigration matters, and that for the virtue of protecting the national community, they must work toward the enforcement of the statute. However, the court does not believe it must defer to the interests of the Attorney General (and expanding his power) to “review the lawfulness of an alien’s continued detention.”(Zadvydas, B) This is the extent to which the Court included social background facts into its opinion, which seems to weaken the critically important decision when applied to detainees in wartime. Had the Court more clearly distinguished the reason for applying the holding in Question #1 to aliens in deportation cases, but not to suspected terrorists detained without criminal charges, within the context of any multiple sources of social background fact, the opinion would be much stronger in terms of harmonizing the different facets of legal reasoning.

WIDELY SHARED VALUES

Finally returning to the Due Process clause of the 5 th Amendment, the court held that “freedom from imprisonment [without justification] lies at the heart of the liberty protected by the Due Process Clause.”(Zadvydas, ‘held’ (a)) The freedom referred to here is freedom from unjust imprisonment, which is absolutely categorized as a widely shared value among the American public. In accordance with the duty of protecting the national community and maintaining a standard of procedural due process, imprisonment is at times necessary, but freedom from unjust imprisonment is of the utmost importance to a country built on the premise of individual liberties being as important as the social welfare. “The civil confinement [in Zadvydas] is potentially permanent,”(Zadvydas) which ties the shared public value of freedom from unjust imprisonment to the potential for
indefinite imprisonment under the alien detention laws discussed earlier. This is, like the court’s use of rules of law, a flowing harmony of legal reasoning in justification of the court’s ruling.

**DISSENT**

The dissenting opinions in Zadvydas are primarily founded on categorically differing interpretations of the wording of statutes from the majority reading. The fundamental pieces of legal reasoning are ignored by the dissent, and reasonably so, because the dissent does not disagree with the logic expanded on by the majority regarding interpreting the rule of law, but instead the direct reading of the law itself. The natural ambiguity of words as discussed in Reason In Law (Carter), is justification for reasonably differing readings of the same statute where precedent is found to support both readings and neither can claim to be the empirical truth in the matter. Therefore the dissent need not be analyzed in depth when the recognition of the inherent uncertainty of language is enough.

**FURTHER EXPLANATION**

The details of *Zadvydas v. Davis* are not the only source of governing the indefinite, preventative detention of prisoners at Guantanamo Bay. Under the proposed Patriot Act, “the Attorney General will have the ability to "certify" that the government has reasonable grounds to believe that an alien is a terrorist or is to be engaged in other activity that endangers the national security of the United States. Once that certification is made, and someone is labeled a potential threat, the government will be able to detain him or her indefinitely — based on secret evidence.”(Ramasastry) The Patriot Act threatens to expand John Ashcroft’s powers as much as any other piece of legislation currently on the books. But as we’ve seen in the Zadvydas analysis, the court appropriately reasoned its opinion using the standards of legal reasoning. So, if one believes that the effect of Zadvydas is a negative one, how can the situation in Guantanamo Bay be resolved? One scholar suggests that the legislature, and not the judicial branch, is the most active way to fight the practice of casting a very wide net of suspicion and detaining hundreds of innocents to catch a few guilty persons. Within her argument, Joanne Mariner questions the detention of non-U.S. citizens as a fair, just, and prudent tactic to serve the goal of winning a seemingly impossible, rhetorical war. (Mariner) But while the moral issues revolving around preventative administrative detention remain, the court in fact resolved Zadvydas in an ethically sound, legally justifiable manner.

**WORKS CITED**

