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ZADVYDAS V. DAVIS
533 U.S. 678 (2001).

FACTS

This case involves two separate alien detention cases which were consolidated for argument in front of the United States Supreme Court.¹ Both cases involve resident aliens who, after gaining admission to the United States, were subsequently ordered to be removed by the Immigration and Naturalization Service (“INS”).² The post-removal period detention statute, 8 U.S.C. § 1231(a)(6),³ mandates the detention, for up to 90 days, of aliens who have been ordered to be removed from the United States.⁴ Upon expiration of the 90-day detention period, the Government may continue to detain an alien if, upon review of the alien’s file, the INS District Director determines that either the alien represents a threat to the community, or the alien poses a risk of flight if released.⁵ After the expiration of the 90-day removal period, the burden is on the alien to prove, to the satisfaction of the Attorney General, that he is neither a flight risk nor a danger to the community.⁶

The first case the Court reviewed involved Kestutis Zadvydas, a resident alien, who was ordered to be removed from the U.S. when he was released on parole after serving two years of a 16-year sentence for possession of cocaine with intent to distribute.⁷ Zadvydas was born to Lithuanian parents in a displaced person camp in Germany.⁸ All attempts by the INS to deport Zadvydas failed.⁹ Both Germany and Lithuania refused to accept him because he was not a citizen of either country.¹⁰ Consequently, Zadvydas could not be removed from the United States, and was detained past the 90-day removal period.¹¹

Zadvydas challenged his detention by filing a writ of habeas corpus in

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

2. *Zadvydas v. Underdown*, 185 F. 3d 279 (5th Cir. 1999); *Ma v. Reno*, 208 F. 3d 815 (9th Cir. 2000).

3. 8 U.S.C. § 1231(a)(6) (2001). “Inadmissible or criminal aliens. An alien ordered removed who is inadmissible under section 212 [8 U.S.C. § 1182, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4); 8 U.S.C. § 1227, (a)(1)(C), (a)(2), or (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).”

4. *Id.*

5. *Zadvydas*, 533 U.S. at 683..

6. *Id.*

7. *Id.* at 684.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

1997.¹² The District Court for the Eastern District of Louisiana granted the writ, and ordered Zadvydas to be released under supervision.¹³ The United States Court of Appeals for the Fifth Circuit reversed the lower court's ruling, and sustained the order detaining Zadvydas past the 90-day detention period.¹⁴ The court ruled that the detention of Zadvydas beyond the 90-day removal period did not violate the United States Constitution because eventual deportation was still possible, and the United States was making good faith efforts to deport him.¹⁵ According to the Court of Appeals, the INS could legally detain an alien, who is currently under an order of removal, past the removal period if it believes the alien represents either a threat to the community or a significant risk of flight, and is still making good faith efforts to deport them.¹⁶

The second case involved Kim Ho Ma, a Cambodian who had been a resident alien in the United States since the age of seven.¹⁷ During his stay in the United States, Ma was involved in a gang-related shooting and was sentenced to 38-months imprisonment.¹⁸ After serving two years of his sentence, he was released to the INS and was subsequently ordered removed.¹⁹ Ma proved to be non-deportable due to the absence of a repatriation treaty between Cambodia and the United States.²⁰ The INS detained Ma beyond the 90-day removal period because it believed Ma would represent a threat to the community if released due to his prior gang involvement and his defiant activities while incarcerated.²¹

Ma filed a writ of habeas corpus under 28 U.S.C. § 2241²² and was released by a panel of judges sitting on the Federal District Court for the Western District of Washington.²³ The court held that the Constitution forbids the post-detention-period detention of a person when there appears to be no reasonable chance of deportation.²⁴ The United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling and held that the post-removal-period detention statute only authorized the detainment of aliens for

12. *United States v. Zadvydas*, 986 F. Supp. 1011 (E.D. LA. 1997).

13. *See id.* (holding that because Zadvydas' detention would continue indefinitely, any further detention without possibility of removal constituted violation of due process).

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

15. *Id.*

16. *Id.*

17. *Ma v. INS*, 56 F. Supp. 2d 1165 (W.D. WASH. 1999).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. 28 U.S.C. § 2241 (2001).

23. *Ma*, 56 F. Supp. 2d at 1165.

24. *Id.* at 1165.

a “reasonable time” past the 90-day removal period.²⁵ Given the fact that there was no repatriation treaty between the United States and Cambodia, the Ninth Circuit determined that detention after the 90-day period was unreasonable, and therefore in violation of 8 U.S.C.S. § 1231 (a)(6).²⁶

The United States Supreme Court granted certiorari in both cases, in order to decide whether the Attorney General could constitutionally detain removable aliens beyond the 90-day removal period if there was no reasonable probability that the Government would be able to actually deport them.²⁷

HOLDING

The United States Supreme Court vacated both the judgments of the Fifth Circuit and Ninth Circuit, holding that detention of aliens who have been ordered to be removed but have no reasonable likelihood of removal is not authorized by 8 U.S.C.S. § 1231(a)(6).²⁸ The Court interpreted § 1231(a)(6) to contain an implicit “reasonable time” limitation of six months, which would be subject to federal court review.²⁹ Longer confinement is only authorized for the purpose of effectuating removal and protecting the public at large.³⁰ The Court held that once removal has proved to be impossible or highly unlikely, further detention is unreasonable and therefore unauthorized by the statute.³¹

ANALYSIS

The Court recognized that a statute that permits indefinite detention raises serious constitutional issues.³² The Fifth Amendment’s Due Process clause forbids the federal government to deprive any person of life, liberty, or property without due process of law.³³ Government detention violates the Due Process Clause unless adequate procedural protections have been afforded or, in non-punitive proceedings, special circumstances outweigh the individual’s constitutionally protected interest.³⁴

Whenever the Court is faced with problems that raise serious constitutional concerns it is customary to interpret the statute narrowly to

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

26. *Ma*, 208 F. 3d at 815.

27. *Zadvydas v. Underdown*, 531 U.S. 923 (2000) (granting certiorari).

28. *Zadvydas*, 531 U.S. at 702.

29. *Id.* at 701.

30. *Id.*

31. *Id.* at 702.

32. *Id.* at 690.

33. U.S. CONST. amend. V.

34. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

avoid the question of constitutionality.³⁵ In order to avoid the substantive constitutional problems potentially contained in the statutory language, the Court inferred a limitation on the government's power to sustain post-removal-period detention of an alien to a period reasonably necessary to ensure the alien's removal.³⁶

The Court then analyzed the statute, reading in this limitation, in terms of the two stated regulatory purposes of post-removal-period detention.³⁷ The stated justifications for continued detention are to ensure that the alien is available for deportation and to prevent possible harm to society if the alien were to be released.³⁸

The Court denied the legitimacy of petitioner Zadvydas' and respondent Ma's continued detention on the grounds that it did not serve either of the stated purposes of the statute, those being prevention of harm to society and avoiding pre-removal flight.³⁹ The Court found that the first statutory justification, preventing pre-removal flight, was no longer served when it became clear that deportation was no longer feasible.⁴⁰ This was because it was no longer necessary for the government to ensure an alien's appearance at the time of deportation once deportation had been deemed virtually impossible.⁴¹ The Court analyzed the second justification, preventing danger to society, and ruled that once removal is unlikely, detention on those grounds is only permissible with the existence of "special circumstances,"⁴² and then only after substantial procedural protections have been afforded.⁴³

The Court determined that the post-removal-period provision was too broad because it did not limit indefinite detention to special circumstances and could be interpreted to apply even to persons who were held for minor infractions, such as tourist visa violations.⁴⁴ The Court was also concerned with the limited procedural safeguards available to the detained alien, which

35. *Zadvydas*, 533 U.S. at 689; see also Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297 (1996) (explaining the doctrine of constitutional avoidance as directing judges to construe issues in such a way as to avoid unnecessarily raising constitutional questions).

36. *Zadvydas*, 533 U.S. at 689.

37. *Id.* at 690-691.

38. *Id.* at 690.

39. *Id.* at 690-691.

40. *Id.*

41. *Id.*

42. See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding special circumstances such as past violent sexual behavior could be sufficient to warrant further detention); see *Zadvydas*, 533 U.S. at 691 (identifying suspected links to terrorists and mental illness as other special circumstances which could warrant additional detention in protection of society); see also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that an individual's constitutionally protected liberty interests may be overridden even in a civil context).

43. *Zadvydas*, 533 U.S. at 692.

44. *Id.*

under the statute were limited to an administrative hearing.⁴⁵ During such an administrative hearing, the alien bears the burden of proof that he or she is not dangerous.⁴⁶ In addition, the Court noted that there exists little significant appellate review of the hearing's ruling.⁴⁷ This structure makes it difficult for detained aliens to get adequate protection against unconstitutional deprivations of due process.⁴⁸

The Government argued that, under the Constitution, alien status alone could justify indefinite detention under *Shaughnessy v. United States ex rel. Mezei*.^{49, 50} In *Mezei*, the Court held that the continued exclusion of an alien being held on Ellis Island for 21 months without a hearing did not constitute unlawful detention.⁵¹ The Court distinguished *Mezei* from the present cases because in *Mezei*, the alien had been stopped at the border before being allowed to enter the country.⁵² Since *Mezei* had not yet gained admission to the country, he was not entitled to the same protections as persons within the United States under the Constitution.⁵³ The Court pointed out that although all persons within the United States are entitled to the protections afforded by the Constitution, those who are stopped at the border are not yet within this class.⁵⁴

The Government further argued that Congress has plenary power to determine the law with relation to immigration, and therefore the judiciary must afford substantial deference to legislative judgment in this area.⁵⁵ The Court clarified that Congressional power is subject to the judicially enforced limitations set forth by the Constitution.⁵⁶ The Court stated that the Government was mischaracterizing the issue as one of whether admitted aliens have a right to remain against the national will despite Congress' plenary power.⁵⁷ The true issue, the Court stated, was whether the Government can constitutionally subject non-removable aliens to indefinite terms of incarceration under 8 U.S.C.S. § 1231(a)(6).⁵⁸ Just disposition of these cases did not require inquiry into the legislature's power to regulate immigration, but

45. *Id.*

46. *See* 8 U.S.C. § 1231.

47. *Zadvydas*, 533 U.S. at 692.

48. *Id.*

49. 345 U.S. 206 (1953).

50. *Zadvydas*, 533 U.S. at 692.

51. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

52. *Zadvydas*, 533 U.S. at 692-693.

53. *Id.*

54. *Id.* at 694.

55. *Id.* at 695.

56. *Id.*

57. *Id.*

58. *Id.*

rather solely into the substantive limitations placed by the Due Process Clause upon the Attorney General's discretion in respect to post-removal-period detention decisions.⁵⁹

The Government also argued that because aliens do not have the right to live at large in the United States, they therefore possess a diminished liberty interest from all other persons within the national borders.⁶⁰ The Court disagreed and stated that the Government did not have to allow the aliens to live without restrictions in the United States, but rather the aliens could be forced to adhere to release conditions and could be governmentally supervised after constitutionally mandated release.⁶¹

The Court conceded, however, that if Congress had made its intent to explicitly vest broad discretion in the Attorney General within the statutory language then the Court would have deferred to that intent.⁶² However, the Court did not find any clear statement of Congress' intent to authorize long-term detention of unremovable aliens.⁶³ While the Government cited to the discretionary language of the statute, including the word "may,"⁶⁴ the Court found that Congress did not confer unbridled discretionary authority on the agency.⁶⁵ If Congress had in fact intended to allow indefinite detention, such an intent would have been manifested explicitly.⁶⁶

The Court concluded that absent a clear intent by Congress, the Court would interpret the statute so as to avoid serious constitutional problems.⁶⁷ The Court, therefore, concluded that once deportation is no longer reasonably foreseeable, any further incarceration past the 90-day removal period is not authorized by the statute.⁶⁸

The Government argued that even under this interpretation, the federal court hearing the habeas petition would have to defer to the government's administrative findings about whether the statute's reasonableness limitation is satisfied without further judicial review.⁶⁹ The Court disagreed, finding that

59. *Id.* at 697.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 8 U.S.C. § 1231(a)(6) "An alien ordered removed who is inadmissible under section 212 [8 U.S.C.S. § 1182, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4); 8 U.S.C.S. § 1227, (a)(1)(C), (a)(2), or (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)" (emphasis added).

65. *Zadvydas*, 533 U.S. at 697.

66. *Id.*

67. *Id.*

68. *Id.* at 699.

69. *Id.*

the federal habeas corpus statute⁷⁰ grants the federal courts the authority to determine what constitutes the amount of time reasonably necessary to ensure deportation.⁷¹ In making such determinations, the federal habeas court must inquire whether a period of additional incarceration is necessary to ensure deportation.⁷² The habeas court should judge reasonableness in relation to how well the additional time will effect the stated legislative goals of continued detention,⁷³ those being the assurance of the alien's presence at the time of removal, and preventing harms to society at large.⁷⁴

In the interest of uniformity between the federal courts, the Court adopted a six-month period as a basic measure of reasonableness.⁷⁵ After this period, if an alien shows that good reason exists to believe that there is no significant chance of deportation then the burden shifts to the Government to rebut that showing.⁷⁶ If the government fails to adequately rebut the alien's showing, then further incarceration will be deemed to be in excess of the agency's statutory authority and release will be mandated.⁷⁷ However, this ruling does not provide automatic release to the alien.⁷⁸ Any release will come after the appropriate showing has been made in an administrative hearing.⁷⁹

The Court overruled the Fifth Circuit's holding that so long as good faith efforts to remove an alien are ongoing, continued detention is constitutionally permissible.⁸⁰ The Court determined that this holding would place too difficult a burden on the alien to prove that deportation was impossible before gaining release from confinement.⁸¹ Also, the Court disagreed with the Ninth Circuit's finding that no reasonable likelihood of removal existed based solely on the fact that no repatriation treaty existed between the United States and Cambodia.⁸² This was held to be error because the Ninth Circuit did not take into account the likelihood of further successful negotiations between the two nations.⁸³

Justice Scalia, joined by Justice Kennedy, dissented from the majority opinion on the grounds that he did not believe that there were any situations

70. 28 U.S.C. § 2241.

71. *Zadvydas*, 533 U.S. at 699

72. *Id.*

73. *Id.*

74. 8 U.S.C. § 1231(a)(6).

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

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 702.

81. *Id.*

82. *Id.*

83. *Id.*

where release could be mandated by the courts.⁸⁴ A removable alien is no different from an excludable alien under *Mezei*.⁸⁵ Therefore, an alien who has been ordered to be removed by the INS has no more rights than persons who are denied entry at the border.⁸⁶ Because the rights enjoyed by aliens who are under an order of removal are as limited as for persons on the threshold of entry, Justice Scalia argued that there should be no judicially imposed impediment to the discretionary authority granted to the Attorney General by Congress.⁸⁷

Justice Kennedy and Chief Justice Rehnquist also dissented from the majority opinion.⁸⁸ In part one of their dissent, which Justices Scalia and Thomas joined, Kennedy argued that the six-month reasonable time limitation imposed by the court was inappropriate.⁸⁹ They argued that the Court misapplied the doctrine of constitutional avoidance by adopting a non-textual interpretation of the statute without adequately considering legislative intent.⁹⁰ The majority's implied limitation will result in impermissible intrusions by the judiciary on the other branches of government.⁹¹

First, the dissent argued that the legislature's intent was clear.⁹² Congress' intent to vest unlimited discretion to detain removable aliens to the Attorney General was manifested by the fact that they set up a distinction between dangerous and non-dangerous aliens.⁹³ The existence of provisions which allow non-detained removable aliens to work during the removal period shows that Congress had meant to draw a strong distinction between non-detainable removable aliens and detainable removable aliens.⁹⁴ The expressed difference in Congress' treatment of the two different, yet similarly situated, groups demonstrates that it intended to give the INS more discretion with respect to the latter group.⁹⁵ This creation of such distinctions is allowable due to Congress' plenary power to control immigration.⁹⁶

The dissent also argued that the interpretation adopted by the majority was flawed in that it did not adequately take into account the legislative goal of

84. *Id.* (Scalia, J., dissenting).

85. *Id.* at 704.

86. *Id.* at 704-705.

87. *Id.* at 705.

88. *Id.* at 705-725.

89. *Id.* at 708 (Kennedy, J., dissenting).

90. *Id.* at 706.

91. *Id.* at 705.

92. *Id.* at 706.

93. *Id.* at 707.

94. *Id.* at 709.

95. *Id.* at 708.

96. *Id.*

protecting society.⁹⁷ A substantial number of aliens are detained pending removal because they represent a risk of flight or risk to the general population.⁹⁸ These risks do not vanish after the Court's imposed six-month reasonableness limitation.⁹⁹

Secondly, and more controversially, Justice Kennedy argued that there is a difference in the extent of constitutional protections enjoyed by different classes of people within the United States.¹⁰⁰ Constitutional rights should not be universally enjoyed equally by all those within the boundaries of the United States.¹⁰¹ According to the dissent, the extent of one's constitutional due process entitlement should be determined by one's status.¹⁰² The dissenting Justices reasoned that detention is only allowed because an alien, who is under order of removal, does not have the same rights under the Constitution as a citizen or non-removable alien.¹⁰³

Justice Kennedy argued that the status of removable aliens should be equivalent to that of excludable aliens.¹⁰⁴ Once an alien has been deemed deportable by the INS, the dissent argued that they should have no constitutionally protected liberty interest within the United States.¹⁰⁵ Therefore, the rights of that alien should be the same as for an alien who is halted at the threshold of entry.¹⁰⁶ The classification of an alien as removable does not come without substantial procedural protections first being afforded.¹⁰⁷ Therefore, no subsequent procedures are mandated by the Due Process Clause.¹⁰⁸

Justice Kennedy's dissent also argued that Court's adoption of the 6-month reasonable time period was unnecessary because federal court review of agency action is available to prevent arbitrary and capricious denial of the procedural safeguards afforded the alien in 8 CFR § 241.4 (2001)^{109, 110} The

97. *Id.* at 709.

98. *Id.*

99. *Id.* at 708.

100. *Id.* at 716.

101. *Id.* at 718.

102. *Id.*

103. *Id.* at 719.

104. *Id.* at 720. See *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206 (holding excludable aliens, i.e. those aliens who never gain entry to the United States, enjoy greatly diminished Constitutional protection, and can be detained indefinitely on the threshold of entering the United States without a hearing).

105. *Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting).

106. *Id.* at 721.

107. *Id.*

108. *Id.* at 718.

109. 8 C.F.R. § 241.4 (2001) (providing procedures for post-hearing detention and removal of aliens) (The agency's actions in accordance with the provisions of 8 C.F.R. § 241.4 would be subject to arbitrary and capricious review by federal courts under 5 U.S.C.S. § 706(2)(A)).

110. *Zadvydas*, 533 U.S. at 724 (Kennedy, J., dissenting) (stating that the agency's actions in accordance with the provisions of 8 C.F.R. § 241.4 would be subject to arbitrary and capricious review by federal courts under 5 U.S.C.S. § 706(2)(A)).

habeas court should only be asked to analyze whether the INS was correct in determining that a particular removable alien represented a risk of flight or danger to the community.¹¹¹ It should not be engaged in inquiry as to repatriation negotiations and other such matters which are related to foreign affairs and are strictly within the province of the executive branch.¹¹²

CONCLUSION

The September 11 terrorist attacks on the United States caused a radical shift in political attitudes toward the detention of certain aliens. On September 26, 2001, President George W. Bush signed the Patriot Act¹¹³ into law. Section 412 of the Act amends section 236A(a) of the Immigration and Nationality Act¹¹⁴ and mandates the detention of any alien certified as engaging in or actively supporting “terrorist activities.”¹¹⁵ The Patriot Act greatly broadens what types of activities can be classified as “terrorist activities.”¹¹⁶ The Act also potentially allows for indefinite detention of immigrants upon a finding by the INS that the alien represents a risk.¹¹⁷

In addition to the Patriot Act, 8 C.F.R. 287.3(d) was amended shortly after September 11 to enable the INS to detain individuals indefinitely with no warrant and no charges being brought, in times of “emergency or extraordinary circumstance.”¹¹⁸ The Attorney General has broad discretion when deciding whether to classify an alien as being engaged in “terrorist activities.” The decision can be based on numerous considerations and it could prove very difficult to try and have an order of detention declared arbitrary and capricious under these circumstances.

In light of the Supreme Court’s recent holding in *Zadvydas v. Davis*, it is possible that the Constitution requires more substantial procedural safeguards to be afforded to these detained aliens, but is not likely. The Court’s opinion in *Zadvydas* seems to condemn the possibility of indefinite detention, yet § 412 of the Patriot Act seems to allow for indefinite detention of suspected aliens. All that is needed for detention to be ordered is a belief by the Attorney General that the immigrant is somehow engaged in or supports “terrorist activities.” If deportation cannot be effectuated, then there is the possibility

111. *Id.* at 724.

112. *Id.* at 725.

113. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

114. The Immigration and Nationality Act, 8 U.S.C. 1101 § 236(A)(a) (2001).

115. USA PATRIOT Act.

116. *Id.*

117. *Id.*

118. 8 C.F.R. 287.3(b) (2001).

that the alien will be subjected to indefinite detention based solely on the Attorney General's belief.

The Court's opinion in *Zadvydas v. Davis* seems to allow for this possibility. The Court mentioned that some special circumstances, including links to terrorists, may be sufficient to allow for indefinite detention.¹¹⁹ The Court also stated in dicta that had Congressional intent been manifested more explicitly it would have been allowable to vest almost complete discretion in the Attorney General to impose indefinite detention.¹²⁰ This was because of Congress' plenary power to control immigration.¹²¹ The Patriot Act clearly places an excessive amount of discretion in the hands of the Attorney General.¹²² *Zadvydas'* judicially-imposed reasonable-time limitation may be satisfied by the Attorney General's good-faith belief that the detention is reasonable and removal is foreseeable.

There is also a possibility that a judicially-imposed reasonable-time limitation may be required for reasons resting outside of the United States Constitution. Some instances of detention under the Patriot Act may be considered violative of legally-operative international human rights accords. Several human rights treaties, to which the United States is a signatory, place substantive limitations on our Congress' ability to enact legislation which would violate treaty provisions.¹²³ Protections exist outside of the Constitution which prevent unreasonable mistreatment of persons by our government.¹²⁴ The Charming Betsy rule of statutory construction compels any reviewing court to construe congressional enactments in such a way as to avoid contravention of international law.¹²⁵ International human rights accords unquestionably proscribe protracted and arbitrary incarceration,¹²⁶ so any subsequent interpretation of the Patriot Act by a U.S. court could have to infer reasonableness limitations similar to the ones inferred from the statutory text by the Court in *Zadvydas*.¹²⁷

119. *Zadvydas*, 533 U.S. at 690 (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

120. *Id.* at 697.

121. *Id.* at 695.

122. USA PATRIOT Act.

123. See The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/910 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 art. 9, § 1.

124. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 art. 9, § 1 (stating "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention").

125. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-118, 2 L. Ed. 208 (1804) (establishing theory of statutory construction requiring courts to interpret acts of Congress in such a way as to avoid violating international law).

126. See International Covenant, *supra* note 121.

127. See generally Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983) (arguing for use of international human rights law

So far Attorney General John Ashcroft has officially refused to disclose information about detainees to interested organizations under the Freedom of Information Act.¹²⁸ It is estimated that there are currently over 1100 persons who have been detained after September 11,¹²⁹ and many more who are under surveillance.¹³⁰ The post-September 11 hysteria is leading us toward a constitutional crisis. Despite ruling on the *Zadvydas* case less than a year ago, the Court must revisit this issue in the near future. Action by the high court is necessary in order to enunciate a more concrete definition of the extent of constitutional and international treaty protections which must be afforded aliens within our borders. Until then, the rights of many will remain undefined and largely unprotected.

Summary and Analysis Prepared by:
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in analysis of constitutional protections for aliens).

128. Freedom of Information Act, 5 U.S.C. § 552 (2001).

129. Tamar Lewin, *A Nation Challenged: The Detainees; Dozens of Israeli Jews are Being Kept in Federal Detention*, N.Y. TIMES, Wed., Nov. 21, 2001, at B7.

130. Mark G. Young, *What Big Eyes and Ears You Have!: A New Regime for Covert Government Surveillance*, 70 FORDHAM L. REV. 1017 (2001).