Clark v. Martinez: Limited Statutory Construction Required by Constitutional Avoidance Offers Fragile Protection for Inadmissible Immigrants from Indefinite Detention

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In its most recent term, the United States Supreme Court held that inadmissible aliens[1] who are subject to removal[2] cannot be held in detention indefinitely. In *Clark v. Martinez*,[3] the Court considered the status of two men, Sergio Suarez Martinez and Daniel Benitez, who fled Cuba and arrived in the United States during the Mariel Boatlift of 1980.[4] Both men were deemed inadmissible because of prior criminal charges and subsequently ordered removed from the United States. They could not be deported, however, because Cuba would not accept their repatriation. Because they could not be removed and because the liberty interests of inadmissible aliens are unprotected under current constitutional jurisprudence, the men faced potentially indefinite detention in government custody. Many inadmissible aliens in a similar quandary have been held for decades, often long after already having served a criminal sentence. In *Clark*, the Supreme Court held that persons such as Martinez and Benitez who have been deemed inadmissible but cannot be removed can only be held in the custody of the Department of Homeland Security ("DHS") for a period of time reasonably sufficient to effect their removal; that period is presumed to be six

[1] The terms used in this Comment have been chosen to reflect statutory language, but with an acknowledgment of the trouble with this choice. *See, e.g.*, Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997) (discussing the negative social and legal effect of seemingly insignificant word choices such as "illegal" or "alien" used in immigration).

[2] The words removal, deportation, and repatriation will be used interchangeably for the purposes of this discussion.

[3] 125 S. Ct. 716 (2005).

[4] As part of a tense diplomatic crisis between Cuba and the United States, Cuban leader Fidel Castro opened the port of Mariel in April of 1980 to all those wishing to emigrate to the United States. In doing so, Castro sought to pressure the United States, to relieve the strain of internal dissent, and to offset growing worldwide sympathy for Cuban asylum-seekers fleeing the island. Between April and October of 1980, nearly 125,000 Cubans, approximately 1.3% of the Cuban population at the time, left from the port of Mariel and braved the Florida Straits to reach the United States. MARIO ANTONIO RIVERA, DECISION AND STRUCTURE: U.S. REFUGEE POLICY IN THE MARIEL CRISIS 4–13 (1991).

months.[5] The Court's ruling resolves the detention quandary in favor of inadmissible aliens, affecting thousands of individuals held in DHS custody.

While the *Clark* decision is a step forward in protecting the civil rights and liberties of immigrants, the limited progress it represents should not be exaggerated. There are currently approximately 2270 inadmissible immigrants in the custody of the DHS,[6] more than half of whom (including as many as 1000 Mariel Cubans) have been held longer than six months, and often far longer, without any realistic prospect of repatriation.[7] The immediate effect of the *Clark* decision may well be the release of at least 747 Cubans who have been deemed inadmissible but cannot be repatriated.[8] More broadly, the Court's ruling in *Clark* will also affect the rights of the many thousands of aliens who are not currently detained, but who could potentially be deemed inadmissible and then subjected to detention.[9] The decision is thus a long-awaited and significant victory for the civil liberties and civil rights of immigrants. Nonetheless, the victory is a fragile one. The Court only begrudgingly reached its decision to extend statutory protection to inadmissible aliens through a process of statutory interpretation consistent with the plenary power doctrine.[10] In this, the *Clark* Court openly avoided granting inadmissible aliens constitutional protection from indefinite detention. Going further, the Court hinted that it would uphold a revision of the relevant statute which would allow indefinite detention of inadmissible aliens. Particularly troubling is that, in suggesting permissible statutory justifications for continued detention, the Court framed immigrant detention with vaguely defined notions of security. By doing so, the Court has given the government access to dangerously overbroad language with which to justify indefinite detention of certain classes of aliens. Among the most vulnerable are aliens present in the United States under parole status.

Cuban immigrants who arrived during the Mariel Boatlift of 1980 represent the largest single group to be "paroled" into the United States,[11] a

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[5] *Clark*, 125 S. Ct. at 750.

[6] The Immigration and Naturalization Service ("INS") was replaced by the Bureau of Immigration and Customs Enforcement under DHS in March of 2003, with responsibility for all functions relating to detention and removal. *See* 6 U.S.C.A. § 251(2) (West Supp. 2004).

[7] Coralie Carlson, *Detained Mariel Cubans Awaiting Release After Court Decision*, A.P., Jan. 13, 2005, *available at* http://ap.tbo.com/ap/florida/MGBLE25T24E.html; Rui Ferreira, *Inmigración Analiza el Fallo Sobre Presos del Mariel*, El Nuevo Herald, Jan. 15, 2005, *available at* http://www.miami.com/mld/elnuevo/2005/01/15/news/local/10649798.htm; Linda Greenhouse, *Supreme Court Rejects Mariel Cubans' Detention*, N.Y. Times, Jan. 13, 2005, at A20.

[8] Ferreira, *supra* note 7.

[9] Although exact figures on the number of people in this precarious position do not exist, there are certain to be many thousands. *See* Noelle Crombie, *Cuban Case May Clarify U.S. Power to Detain*, Oregonian, Sept. 18, 2004, at A1.

[10] Under the plenary power doctrine, immigration policy is so "exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952). The Supreme Court has recently upheld such authority. *See* Demore v. Kim, 538 U.S. 510 (2003).

[11] Allison Wexler, Note, *The Murky Depths of the Entry Fiction Doctrine: The Plight*

peculiar immigration status by which individuals are physically permitted to live in the United States but are not deemed to have officially entered the country. Parolees may be allowed into the United States at the discretion of the Attorney General "for urgent humanitarian reasons or significant public benefit," but "such parole of such alien shall not be regarded as an admission of the alien."[12] Pursuant to this authority, approximately 122,000 Mariel Cubans were paroled into the United States between the spring of 1980 and the summer of 1981.[13] Once granted parole status, aliens are released from detention, and because they may own property and hold jobs as if they were residents, most parolees are able to live productive lives.[14] Nevertheless, under the so-called "entry fiction" doctrine, parolees are legally classified as though they were standing at the border seeking entry.[15]

The entry fiction doctrine is important because many constitutional rights are unavailable to parolees since they are not regarded as having entered the United States. Once an alien has entered the United States, even illegally, the alien can invoke the constitutional protections of the Fifth and Sixth Amendments.[16] The Supreme Court has held, however, that aliens who have not been admitted can be summarily denied the protection of these constitutional rights. In an historic case, *Shaughnessy v. United States ex rel. Mezei*,[17] the Court denied constitutional protection to an alien detained at Ellis Island.[18] The United States could not deport Mezei because no country would accept him.[19] Since Mezei could claim no constitutional rights, his detention could effectively continue indefinitely,[20] leaving him stranded and imprisoned at Ellis Island.[21]

Thousands of parolees, the largest number of whom are Mariel Cubans, are held in detention under the entry fiction doctrine. Although most

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*of Inadmissible Aliens Post-*Zadvydas, 25 CARDOZO L. REV. 2029, 2034 n.42 (2004).

[12] 8 U.S.C. § 1182(d)(5)(A) (2000).

[13] Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982) (detailing facts of the Mariel Boatlift).

[14] *See* Transcript of Oral Argument at 14, Clark v. Martinez, 125 S. Ct. 716 (2005) (Nos. 03-878, 03-7434), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-878.pdf.

[15] Kaplan v. Tod, 267 U.S. 228, 230 (1925) (holding that an inadmissible alien present in the United States for five years was subject to deportation because she had never entered the country within the meaning of the law and thus "was to be regarded as stopped at the boundary line"); *see also* Wexler, *supra* note 11, at 2035 n.49.

[16] Plyler v. Doe, 457 U.S. 202, 212 (1982) (holding in part that all persons within the territory of the United States, including aliens unlawfully present, may invoke the Fifth and Sixth Amendments); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that "all persons within the territory of the United States are entitled to the protection guarantied by" the Fifth and Sixth Amendments).

[17] 345 U.S. 206 (1953).

[18] *Id.* at 214; *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (denying that due process rights applied to alien who, though at Ellis Island, had not entered the United States).

[19] *Mezei*, 345 U.S. at 207.

[20] *Id.* at 215.

[21] *Id.* at 207.

Mariel Cubans were eventually "adjusted" to permanent resident status under the Immigration Reform and Control Act of 1986,[22] not all were able to benefit from the adjustment. Under the Immigration and Nationality Act of 1952,[23] an alien may be deported after a removal hearing if convicted of certain crimes.[24] Of the nearly 125,000 Cubans who emigrated to the United States during the Mariel Boatlift, 1171 were suspected of prior imprisonment in Cuba for a wide range of criminal offenses serious enough to warrant continued detention pending removal proceedings.[25] Others were found inadmissible for other reasons, including conviction of a crime in the United States[26] prior to having their status adjusted.[27] Typically an alien would be detained pending removal after having first served his or her criminal sentence,[28] and would then be removed. Cuba, however, has refused to accept the repatriation of the vast majority of its nationals who fled.[29] Because they could not be repatriated, many of these inadmissible Mariel Cubans have remained in detention for decades, long after already

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[22] Pub. L. No. 99-603, § 201(a)(1), 100 Stat. 3359, 3394 (codified as amended at 8 U.S.C. § 1255a (2000)).

[23] *See* Act of June 27, 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1557 (2000)).

[24] *See* 8 U.S.C. § 1227(a)(2) (2000) (detailing the crimes for which an alien may be deemed inadmissible).

[25] RIVERA, *supra* note 4, at 133. Cuban leader Fidel Castro reportedly used the Mariel Boatlift to rid Cuba of several thousand people whom the regime deemed "undesirables," including petty criminals and mentally disturbed persons. GASTÓN A. FERNÁNDEZ, THE MARIEL EXODUS: TWENTY YEARS LATER: A STUDY ON THE POLITICS OF STIGMA AND A RESEARCH BIBLIOGRAPHY 20 (2002). Although exact figures are uncertain, INS records show 1306 Mariel Cubans identified as having questionable prior backgrounds. *Id.* However, even among those identified as "hardened criminals," a significant number were in prison in Cuba for committing minor thefts or for "desperate acts of rebellion." *Id.* at 27.

[26] The popular conception of the "Marielitos" has been conflated with that of criminality, violence, and deviance, evinced most prominently in the 1983 remake of the film *Scarface*. This view is not only unfair but, according to many researchers, inaccurate. *See, e.g.*, FERNÁNDEZ, *supra* note 25, at 23–41 (recounting how the Cuban regime promoted the pathological stereotype of Mariel Cubans for internal political reasons and how that stigma was transferred to the United States and has been amplified, particularly by the U.S. media); Benigno E. Aguirre, *Cuban Mass Migration and the Social Construction of Deviants*, 13 BULL. LATIN AM. RES. 155, 155 (1994) (explaining the divergence between popular American knowledge about Mariel Cubans and sociological knowledge about them); Ramiro Martinez, Jr., et al., *Reconsidering the Marielito Legacy: Race/Ethnicity, Nativity, and Homicide Motives*, 8 SOC. SCI. Q. 397, 408 (2003) (studying homicides among Mariel Cubans and concluding that "the crime-related hysteria over the Mariel Boatlift was largely unjustified").

[27] The crimes that lead to removal need not always be serious. Demore v. Kim, 538 U.S. 510, 558 (2003) (Souter, J., concurring in part and dissenting in part) (noting that "[d]etention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor," such as writing bad checks or stealing bus transfers).

[28] *See* Michelle Carey, Comment, *"You Don't Know If They'll Let You Out in One Day, One Year, or Ten Years . . ." Indefinite Detention of Immigrants After* Zadvydas v. Davis, 24 CHICANO-LATINO L. REV. 12, 12 (2003).

[29] Fernandez-Roque v. Smith, 734 F.2d 576, 578 (11th Cir. 1984) (detailing facts of the Mariel Boatlift).

having served their criminal sentences.[30] Also languishing in detention are thousands of parolees from countries that, like Cuba, do not have repatriation agreements with the United States—such as Cambodia, Laos, and Vietnam—or from countries which either do not have a functioning government or have a reputation for refusing repatriation—such as China, Haiti, Jamaica, Jordan, and several countries formerly part of the Soviet Union.[31]

Prior to *Clark*, the Supreme Court in *Zadvydas v. Davis*[32] held that admitted aliens subject to removal ("removable aliens"[33]) cannot be detained indefinitely; it did not, however, consider the government's authority vis-à-vis *in*admissible aliens. In *Zadvydas*, which was handed down only three months before the September 11, 2001, terrorist attack on the World Trade Center, the Court attempted to clarify an ambiguity in the federal detention and removal statute related to the length of time that the government could detain removable aliens if they could not be repatriated or deported. The Court held 5-4 that after six months, if the removable alien "provides good reason," which has not been rebutted by the government, to believe "that there is no significant likelihood of removal in the reasonably foreseeable future," the alien must be released.[34] The federal detention and removal statute authorizes the government to hold an alien in custody during a ninety-day removal period once a final removal order has been issued by DHS,[35] but under § 1231(a)(6) of the statute, the government "may" detain such aliens subject to removal *beyond* this ninety-day removal period.[36] The Court held that the "may" in § 1231(a)(6) does not authorize indefinite detention. Wary of the "serious constitutional problem" that indefinite detention poses in the face of the Fifth Amendment,[37] the majority read a limitation into the statute pertaining to

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[30] Carey, *supra* note 28, at 31; Carlson, *supra* note 7; Crombie, *supra* note 9; Ferreira, *supra* note 7.

[31] Carey, *supra* note 28, at 18.

[32] 533 U.S. 678 (2001).

[33] For the purposes of this discussion, the term "removable alien" refers to an admitted alien who was subsequently ordered removed. While an "inadmissible" alien is also removable, such an alien will simply be referred to as "inadmissible" since inadmissiblility implies removability. This definition reflects the language of 8 U.S.C. § 1231(a)(6) (2000). *See infra* note 36.

[34] The "6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas v. Davis, 533 U.S. 678, 701 (2001). Although the detention period may end, the alien may be released subject to continued supervision under 8 U.S.C. § 1231(a)(6), the provision at issue in *Zadvydas*. *See infra* note 36.

[35] 8 U.S.C. § 1231(a)(2) (2000).

[36] "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)." 8 U.S.C. § 1231(a)(6) (2000).

[37] *Zadvydas*, 533 U.S. at 690.

detention after the removal period. Writing for the majority, Justice Breyer maintained that removable aliens may be detained after the post-removal period only so long as "reasonably necessary to bring about that alien's removal from the United States."[38] In an effort to provide guidance to immigration officials, the Court further stated that a "presumptively reasonable period of detention" would be six months.[39] In reaching its decision, the Court considered the distinction between aliens who have "effected an entry" into the United States and those who have not as one which "makes all the difference" in terms of available constitutional rights,[40] in keeping with *Mezei*.[41] Ultimately, *Zadvydas* left it unclear if the Court would rule differently on whether § 1231(a)(6) permits the indefinite detention of inadmissible aliens, such as parolees. The *Zadvydas* Court explicitly avoided clarifying the status of such individuals, only stating that aliens "who have not yet gained initial admission to this country would present a very different question."[42]

In the years after *Zadvydas*, the federal courts of appeals split over this "very different question." The Third, Fifth, Seventh, Eighth, and Eleventh Circuits did not extend *Zadvydas*'s prohibition on indefinite detention to inadmissible aliens.[43] All of these decisions involved inadmissible Mariel

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[38] *Id.* at 689.

[39] *Id.* at 701. The *Zadvydas* Court established this six-month presumption because it "[had] reason to believe" that Congress "doubted the constitutionality of detention for more than six months." *Id*. It based its reasoning on the fact that Congress originally had provided for a six-month removal period rather than the ninety-day period. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which added the post-removal period provision but shortened the removal period from six months to ninety days. 8 U.S.C. §§ 1226(c), 1231(a) (2000).

[40] *Zadvydas*, 533 U.S. at 693.

[41] For immigrant advocates, *Zadvydas*'s reinforcement of *Mezei* is its greatest drawback. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (expressing disappointment that *Zadvydas* affirmed the distinction between aliens who have entered officially and those who have entered illegally); Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 407 (2002) (discussing the Court's "analytical confusion" and its conflation of distinct categories of aliens, declaring that "the [*Zadvydas*] victory came at a real cost" because "the Court all but reaffirmed the long-deplored decision in *Mezei*").

[42] *Zadvydas*, 533 U.S. at 682.

[43] Sierra v. Romaine, 347 F.3d 559 (3d Cir. 2003) (holding that § 1231(a)(6) allows the Attorney General to detain an inadmissible alien indefinitely because constitutional due process concerns do not apply to aliens not admitted); Benitez v. Wallis, 337 F.3d 1289 (11th Cir. 2003) (per curiam) (holding that a six-month presumption of reasonableness is inapplicable and that the government has the authority to indefinitely detain inadmissible aliens who have never truly resided in the United States); Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003) (deciding that the government's statutory authority to detain inadmissible aliens is not limited by *Zadvydas* because such detention does not raise the same constitutional concerns as does the detention of admitted aliens); Rios v. INS, 324 F.3d 296 (5th Cir. 2003) (per curiam) (relying on distinction between deportable and excludable aliens in *Zadvydas* to rule that continued detention does not violate the constitutional rights of a parolee); Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir. 2001) (holding that the United States can indefinitely detain an alien who was never granted admission because the Fifth Amendment does not offer the same protections to inadmissible aliens as it does to resident aliens).

Cubans seeking to challenge their indefinite detentions. All five appellate decisions implicitly or explicitly relied on the entry fiction doctrine in rejecting the view that inadmissible aliens can claim constitutional rights, and all but one of them relied in part on the language in *Zadvydas* suggesting that the detention of inadmissible aliens "would present a very different question."[44]

In contrast, the Ninth and Sixth Circuits extended the Supreme Court's prohibition on indefinite post-removal-period detention to inadmissible aliens.[45] The Ninth and Sixth Circuits, however, used radically divergent reasoning in ruling that inadmissible aliens could not be subjected to indefinite detention. In *Xi v. INS*,[46] the Ninth Circuit held that a Chinese alien appellant who, in contrast to parolees, was literally at the border[47] could not be detained indefinitely.[48] According to the *Xi* Court, § 1231(a)(6) "does not draw any distinction" for the purposes of removal between admissible and inadmissible aliens.[49] The statute should apply evenly to both classes of aliens, the court reasoned, since "where the Legislature makes a plain provision, without making any exception, the courts can make none."[50] The Ninth Circuit explicitly limited the basis for its holding to statutory interpretation, suggesting that if it were deciding on a constitutional basis the result would be different.[51]

The Sixth Circuit favored a constitutional basis for limiting detention of inadmissible aliens. In *Rosales-Garcia v. Holland*,[52] the Sixth Circuit invalidated the continued detention of two inadmissible Mariel Cubans using statutory "plain language" reasoning very similar to that of the Ninth Circuit.[53] The Sixth Circuit went further, maintaining that such a result was

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[44] *See Sierra*, 347 F.3d at 574; *Benitez*, 337 F.3d at 1299; *Borrero*, 325 F.3d at 1007; *Hoyte-Mesa*, 272 F.3d at 991.

[45] Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003) (holding that because it does not distinguish between admissible and inadmissible aliens, § 1231(a)(6) contains a reasonableness limitation applicable to inadmissible aliens); Xi v. INS, 298 F.3d 832 (9th Cir. 2002) (applying the six-month presumption for what is considered a "reasonable" period of post-removal detention to an inadmissible detainee).

[46] 298 F.3d 832 (9th Cir. 2002).

[47] *Xi v. INS* has been applied to parolees. *See* Cera-Zaldivar v. INS, 55 Fed. Appx. 425, 426 (9th Cir. 2003) (unpublished opinion) (relying on *Xi* to uphold the habeas challenge of the continued detention of a Mariel Cuban parolee).

[48] *Xi*, 298 F.3d at 836.

[49] *Id.* at 835.

[50] *Id.* at 836 (quoting Lessee of French v. Spencer, 62 U.S. 228, 238 (1858)).

[51] "Because the Supreme Court construed the statute, we are bound by that framework and thus are not called upon to address the scope of any constitutional claims of an inadmissible alien. Indeed, like the Supreme Court, we recognize that the result might be different were this a constitutional question." *Id.* at 834.

[52] 322 F.3d 386 (6th Cir. 2003).

[53] "[W]e find it difficult to believe that the Supreme Court in *Zadvydas* could interpret § 1231(a)(6) as containing a reasonableness limitation for aliens who are removable on grounds of deportability but not for aliens who are removable on grounds of inadmissibility. Section 1231(a)(6) itself does not draw any distinction between the categories of removable aliens . . . ." Rosales-Garcia v. Holland, 322 F.3d 386, 404 (6th Cir. 2003).

also compelled by the fact that inadmissible "aliens—like all aliens—are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."[54] The constitutional portion of the opinion was, however, only dicta because the ultimate decision in *Rosales-Garcia* rested on the interpretation of § 1231(a)(6) in light of *Zadvydas*.[55] Nonetheless, the Sixth Circuit's constitutional reasoning remains significant because it flies in the face of *Mezei*. According to the Sixth Circuit, no person—whether admitted or not—can be subjected to limitless government action; to hold otherwise would suggest that in the extreme, nothing could stop the government from torturing or summarily executing inadmissible aliens.[56] The court stated, "[w]hile we respect the historical tradition of the 'entry fiction,' we do not believe it applies to deprive aliens living in the United States of their status as 'persons' for the purposes of constitutional due process."[57]

Two companion cases which differed on *Zadvydas*'s "very different question" were under consideration in *Clark*: one from the Ninth Circuit, *Crawford v. Martinez*,[58] and the other from the Eleventh Circuit, *Benitez v. Wallis*.[59] Both cases involved Cuban men who had been paroled into the United States but, after serving criminal sentences, had been classified inadmissible.[60] Neither individual qualified for adjustment under the Cuban Refugee Adjustment Act because of prior criminal activity.[61] Sergio Suarez Martinez was paroled into the United States after fleeing Cuba in June of 1980 during the Mariel Boatlift, and eventually settled in Fresno, California.[62] In 1991, he unsuccessfully sought the adjustment of his status from that of parolee to that of lawful permanent resident.[63] His application was denied based on criminal conduct consisting of a prison sentence for assault with a deadly weapon served in Rhode Island (pled guilty in 1983) and five years of probation served in California for burglary (convicted in 1984).[64] He subsequently served three years in a California prison for petty theft (convicted in 1996) and another three years for assault with a deadly weapon (convicted in 1998) before being sentenced to two years in prison for attempted oral copulation by force (convicted in 1999).[65] Martinez's parole was revoked in December 2000, and in January 2001, an immigration judge ordered him removed to Cuba.[66] In July 2002, he

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[54] *Id.* at 409.
[55] *Id.* at 415.
[56] *Id.* at 410.
[57] *Id.* at 409.
[58] No. 03-35053, 2002 WL 23892563 (9th Cir. Aug. 18, 2003), *cert. granted*, 540 U.S. 1217 (2004).
[59] 337 F.3d 1289 (11th Cir. 2003), *cert. granted*, 540 U.S. 1147 (2004).
[60] Clark v. Martinez, 125 S. Ct. 716, 720 (2005).
[61] *Id.*
[62] Brief for the Respondent at 11, Clark v. Martinez, 125 S. Ct. 716 (2005) (No. 03-878).
[63] Brief for the Petitioners at 9, *Clark* (No. 03-878).
[64] *Id.*
[65] *Id.* at 10–11.
[66] *Clark*, 125 S. Ct. at 721.

filed a habeas corpus petition in the United States District Court for the District of Oregon.[67]

In a one-page order without opinion, the district court granted Martinez's petition based on the Ninth Circuit's opinion in *Xi*.[68] The district court applied the prohibition on indefinite detention to both inadmissible and admitted but removable aliens without reaching the constitutional questions raised by such detention.[69] Accepting that Martinez's removal to Cuba was not reasonably foreseeable, it ordered his release under supervisory conditions.[70] In an unpublished decision, the Ninth Circuit affirmed Martinez's conditional release and, like the district court, cited its decision in *Xi*.[71]

Daniel Benitez was also paroled into the United States during the Mariel Boatlift.[72] Like Martinez, Benitez applied to adjust his status to that of lawful permanent resident but was denied because of a criminal conviction. He had served three years' probation in Florida for a 1983 conviction for grand theft.[73] Ten years later, Benitez pled guilty to a multi-count indictment for burglary and aggravated battery in Florida state court and was sentenced to twenty years' imprisonment.[74] The INS subsequently revoked his parole status, and in 1994, an immigration judge ordered Benitez removed to Cuba.[75] Benitez challenged his consequent indefinite detention as unconstitutional in light of *Zadvydas* and filed a habeas petition in the United States District Court for the Northern District of Florida.[76] The district court accepted that Benitez's removal would not occur in the foreseeable future,[77] but it nevertheless concluded that Benitez's continued detention was permissible.[78] It found no constitutional or statutory prohibition on Benitez's detention, reasoning that *Zadvydas* was inapplicable because *Zadvydas* limited its holding to resident aliens.[79]

In its affirmance, the Eleventh Circuit asserted that no constitutional protections were available, citing *Mezei* as well as the *Zadvydas* Court's refusal to overturn it.[80] The Eleventh Circuit concluded that "[a]lthough Benitez has been present physically in the United States for more than 20

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[67] *Id.*

[68] Brief for the Petitioners at 11, *Clark* (No. 03-878); Brief for the Respondent at 13–14, *Clark* (No. 03-878).

[69] Brief for the Petitioners at 11, *Clark* (No. 03-878); Brief for the Respondent at 13–14, *Clark* (No. 03-878).

[70] *Clark*, 125 S. Ct. at 721.

[71] *See id.* at 722 (citing Martinez v. Ashcroft, No. 03-35053, 2003 WL 23892563 (9th Cir. Aug. 18, 2003)). *See supra* notes 47–51 and accompanying text for discussion of *Xi*.

[72] Benitez v. Wallis, 337 F.3d 1289, 1290 (11th Cir. 2003), *cert. granted*, 540 U.S. 1147 (2004).

[73] *Id.*

[74] *Id.* at 1290–91.

[75] Clark v. Martinez, 125 S. Ct. 716, 721 (2005).

[76] *Wallis*, 337 F.3d at 1292.

[77] *Id.* at 1293 n.12.

[78] *Id.* at 1292.

[79] *Id.*

[80] *Id.* at 1298.

years,"[81] his indefinite detention did not deprive Benitez of any statutory or constitutional rights.[82] Further, the *Benitez* court claimed that a "drastic expansion of the rights of inadmissible aliens who have never gained entry into this country" would both "create needless difficulties in how the INS processes aliens" and would "create grave security concerns."[83] The court then addressed the level of statutory protection afforded to Benitez under § 1231(a)(6) as applied in *Zadvydas*. In contrast to the Ninth Circuit's approach in *Martinez*, the Eleventh Circuit in *Benitez* viewed the *Zadvydas* ruling as an "as-applied constitutional challenge."[84] Accordingly the "constitutionally problematic aspects" of § 1231(a)(6) could be remedied by interpreting the statute to limit detention only of admissible aliens, which did not mean that constitutional protections must also be extended to inadmissible aliens.[85] The court found no need to offer protection to both classes simply because the statute failed to differentiate between them.[86] The Supreme Court in *Clark*, then, was to consider two cases in which the only discernible difference was whether § 1231(a)(6) authorizes continued detention of inadmissible aliens.[87]

The *Clark* Court ruled 7-2 that § 1231(a)(6) allows the Attorney General to detain inadmissible aliens "only for a period consistent with the purpose of effectuating removal."[88] According to the Court, the Secretary of Homeland Security ("Secretary") lacks the authority to continue to detain inadmissible aliens indefinitely after the post-removal period, presumed to be six months, has passed.[89] In both of the companion cases before the Court, the detainees had been held much longer than the presumptive six-month period.[90] They were held in spite of the fact that for both Sergio Suarez Martinez and Daniel Benitez, removal to Cuba was not reasonably

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[81] *Id.* at 1296.

[82] *Id.* at 1297.

[83] *Id.* at 1300–01.

[84] *Id.* at 1299.

[85] *Id.*

[86] The court reasoned that "[w]hen a statute has different applications, it is not necessary to say that it is categorically infirm." *Id.* It also stated that "[b]ecause Zadvydas was qualified in so many respects and reads like an as-applied decision," the statutory scheme has been left "intact with respect to inadmissible aliens who never have been admitted into the United States." *Id.*

[87] Clark v. Martinez, 125 S. Ct. 716, 722 (2005).

[88] *Id.* at 726. Justices Scalia and Kennedy joined the majority in *Clark* where they did not in *Zadvydas*.

[89] In a case decided the same day as *Clark*, *Jama v. Immigration & Customs Enforcement*, 125 S. Ct. 694 (2005), the Court read *Clark* to stand for the following proposition: "if the Attorney General is unable to secure an alien's removal at the third step, all that is left is the last-resort provision allowing removal to a country with which the alien has little or no connection—if a country can be found that will take him. If none exists, the alien is left in the same removable-but-unremovable limbo as the aliens in *Zadvydas v. Davis* and *Clark v. Martinez*, and under the rule announced in those cases must presumptively be released into American society after six months." *Id.* at 703 (citations omitted).

[90] *Clark*, 125 S. Ct. at 727.

foreseeable.[91] The *Clark* Court reached this decision by construing § 1231(a)(6) such that the statute does not distinguish between admissible and inadmissible aliens.[92] The Court thus chose the path of statutory construction paved by the Ninth Circuit in *Xi*.[93]

After *Zadvydas*, two different interpretations of § 1231(a)(6) were available, as evidenced by the circuit split: either the statute uniformly applies to both categories of aliens or the statute's construction can be limited to admissible aliens. The first interpretation would apply limits on the Secretary's authority to detain under § 1231(a)(6) to both admissible and inadmissible aliens. In the wake of *Zadvydas*, this interpretation, shared by the Sixth and Ninth Circuits, would mean that because admissible aliens could not be detained indefinitely, then neither could inadmissible aliens since they could not be distinguished from admissible aliens per the text of § 1231(a)(6).[94] The alternative interpretation, endorsed by five other circuits, would limit the Secretary's authority to indefinitely detain admissible aliens, while granting such authority with respect to inadmissible aliens.[95] The issue before the Court in *Clark* was indeed a "very different question" from that addressed in *Zadvydas*,[96] but the Court decided to give the same answer: no indefinite detention. In an opinion penned by Justice Scalia, the Court maintained that § 1231(a)(6) does not distinguish between admissible and inadmissible aliens in defining the Secretary's authority to detain beyond the removal period.[97]

According to the Court's reasoning, if indefinite detention of removable aliens raises constitutional problems,[98] and the statute authorizing detention does not distinguish between removable and inadmissible, then the prohibition on indefinite detention must also apply to inadmissible aliens. The *Clark* Court, in reaching its decision, did not overrule *Mezei*. To the contrary, it affirmed the distinction between admissible and inadmissible, agreeing that detention of the latter does not raise the same constitutional concerns.[99] The statute itself, however, does not distinguish between admissible and inadmissible. As a result, in the Court's estimation, a statutory construction that limits the post-removal-period detention would either apply to both groups or to neither. Since the ambiguous language of the statute gives rise to two possible interpretations, one of which "would raise a

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[91] *Id.*
[92] *Id.* at 723.
[93] Xi v. INS, 298 F.3d 832, 836 (9th Cir. 2002).
[94] Rosales-Garcia v. Holland, 322 F.3d 386, 404 (6th Cir. 2003); *Xi*, 298 F.3d 832 at 836.
[95] *See supra* note 43.
[96] *Clark*, 125 S. Ct. at 723.
[97] *Id.* at 727.
[98] *Id.* at 733 (citing Zadvydas v. Davis, 533 U.S. 678, 690 (2003)).
[99] The Court did not take issue with the contention of the government or of the dissenters that the "statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for aliens, such as Martinez and Benitez, who have not been admitted to the United States." *Id.* at 723–24.

multitude of constitutional problems,"[100] the Court relied on the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[101] For the Court, the canon of constitutional avoidance[102]—by which the Court abstains where possible from deciding constitutional questions—compelled this result. The Court's ruling does not establish that detention of inadmissible aliens by itself would raise constitutional questions; it derives support from the principle that statutes may be given a limiting construction as a result of one of the statute's applications even though the statute's other applications would be permissible.[103] Thus, the prohibition on indefinite detention applies to inadmissible aliens even though constitutional problems are not raised by their detention.

Justice O'Connor, in a brief concurring opinion, wrote separately for the express purpose of challenging the strictness of the six-month presumptive limit on post-removal-period detention. She sought to emphasize that "under the current statutory scheme, it is possible for the Government to detain inadmissible aliens for more than six months after they have been ordered removed."[104] In her view, *Zadvydas*'s six-month presumption "is just that—a presumption."[105] For Justice O'Connor, while "the Government has not suggested here any reason why it takes longer to effect removal of inadmissible aliens than it does to effect removal of other aliens," it is plausible "that a longer period is 'reasonably necessary,' to effect removal of inadmissible aliens as a class."[106] Under such reasoning, detention beyond six months would be permissible under § 1231(a)(6) as set forth in *Zadvydas*. Furthermore, according to Justice O'Connor, the Government has at its disposal "other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks."[107] Namely, a provision of the USA PATRIOT Act[108] empowers the Secretary

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[100] *Id.*

[101] *Id.*

[102] *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 191 (1991) (holding that regulations promulgated by the Secretary of Health and Human Services do not raise grave constitutional questions that would lead the Court to assume Congress did not intend to authorize their issuance); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating "where 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").

[103] *Id.* at 724 ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.") (quoting Leocal v. Ashcroft, 125 S. Ct. 377, 384 n.8 (2004)).

[104] *Id.* at 727–28 (O'Connor, J., concurring). The Court in *Zadvydas* in fact said "this 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

[105] *Clark*, 125 S. Ct. at 728 (O'Connor, J., concurring).

[106] *Id.* (citation omitted).

[107] *Id.*

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

of Homeland Security to detain aliens suspected of certain terrorist or dangerous activities.[109] Pursuant to this provision, the Secretary may detain these aliens for successive six-month periods "if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[110]

In an ardent dissent longer than the majority opinion, Justice Thomas not only found the majority's statutory interpretation of § 1231(a)(6) indefensible in light of *Zadvydas*,[111] but also argued that the Court should overrule *Zadvydas* as "wrongly decided."[112] As Justice Thomas read it, *Zadvydas* held "that the detention period authorized by § 1231(a)(6) depends not only on the circumstances surrounding a removal, but also on the type of alien ordered removed."[113] The reason the *Zadvydas* Court set aside the "very different question" of the detention of inadmissible aliens is precisely "because the constitutional questions raised by detaining inadmissible aliens are different from those raised by detaining admitted aliens."[114] The *Zadvydas* Court, in his view, took pains to emphasize that its ruling did not apply "across the board" to all aliens; the opinion freely distinguished between categories of aliens and set aside exceptions, such as circumstances involving terrorism, where prohibitions on detention of aliens are subject to different laws.[115] Justice Thomas took issue with the majority's use of the canon of constitutional avoidance, criticizing the majority for the novelty of such an approach.[116] Under *Mezei* and *Zadvydas*, neither Martinez nor Benitez, as inadmissible parolees, could assert a constitutional claim. To Justice Thomas, this was crucial since under the modern canon of constitutional avoidance, "an ambiguous statute should be read to avoid a constitutional doubt only if the statute is constitutionally doubtful as applied to the litigant before the court."[117] Echoing the Eleventh Circuit's reasoning in *Benitez*, this logic asserts that a statute can have different applications while preserving a single meaning. Justice Thomas disputed that the very meaning of the statute varies according to the factual circumstances surrounding its application, such as whether or not an

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Stat. 272 (codified in scattered titles and sections of the U.S. Code).

[109] 8 U.S.C. § 1226a(a)(3) (2000 & Supp. II 2002).

[110] 8 U.S.C. § 1226a(a)(6) (2000 & Supp. II 2002).

[111] Chief Justice Rehnquist joined this part of the dissent.

[112] *Clark*, 125 S. Ct. at 728 (Thomas, J., dissenting).

[113] *Id.* at 730 (Thomas, J., dissenting).

[114] *Id.* at 729 (Thomas, J., dissenting).

[115] Justice Thomas indicated that *Zadvydas* distinguished between the rights of inadmissible and admissible aliens throughout. *Id.* at 729 (Thomas, J., dissenting). He argued "[i]f it were true that *Zadvydas*' interpretation of § 1231(a)(6) applied to all aliens regardless of the constitutional concerns[,]" the Court in *Zadvydas* would not have needed "to leave aside 'terrorism or other special circumstances'" because "the construction the majority extracts from *Zadvydas* would have applied across the board." *Id.* at 729–30 (Thomas, J., dissenting) (quoting Zadyvdas v. Davis, 533 U.S. 678, 695–96 (2001)).

[116] *Id.* at 729 (Thomas, J., dissenting).

[117] *Id.* at 733 (Thomas, J., dissenting).

alien is admissible.[118] Since the detention of inadmissible aliens does not raise constitutional issues, Justice Thomas advocated "narrowing the statute on a case-by-case basis only if constitutional concerns are actually present."[119] He suggested severing the different applications of § 1231(a)(6), which would allow the Attorney General greater authority to detain inadmissible aliens than admissible aliens.[120] The alternative, in his view, would allow "an end run around"[121] constitutional doctrine, since a litigant could attack a statute as constitutionally invalid based on "hypothetical constitutional doubts"[122] that do not apply to the factual circumstances at hand.

Justice Thomas found fault with the majority for mechanically giving *stare decisis* effect to a decision of statutory interpretation.[123] According to Justice Thomas, the majorities in both *Zadvydas* and *Clark* failed to avoid constitutional questions at all. To the contrary, *Zadvydas* was a statutory holding "in name only" whose "lengthy analysis strongly signaled to Congress that indefinite detention of admitted aliens would be unconstitutional."[124] In light of this strong signal, Justice Thomas feared that *Zadvydas* is "legislatively uncorrectable" because "it is only within the power of the Supreme Court to correct [the] error."[125] *Zadvydas* must therefore be overturned by the Supreme Court.

While the *Clark* decision will affect the rights of countless immigrants and result in the release of hundreds if not thousands of detainees,[126] it is nonetheless a limited victory for the civil liberties and civil rights of immigrants. Both the *Clark* and *Xi* courts limited their analysis to that of

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[118] *See id.* at 724 (Thomas, J., dissenting).
[119] *Id.* at 733 (Thomas, J., dissenting).
[120] *Id.* at 734 (Thomas, J., dissenting).
[121] *Id.* at 733 (Thomas, J., dissenting).
[122] *Id.* at 735 (Thomas, J., dissenting) (emphasis omitted).
[123] *Id.* at 736 (Thomas, J., dissenting).
[124] *Id.* at 737 (Thomas, J., dissenting).
[125] *Id.* "The mere fact that Congress can overturn our cases by statute is no excuse for failing to overrule a statutory precedent of ours that is clearly wrong, for the realities of the legislative process often preclude readopting the original meaning of a statute that we have upset." *Id.* at 736 (Thomas, J., dissenting).
[126] Aside from defining the statutory rights of inadmissible aliens, the *Clark* decision implicated an array of public policy matters and affected many broader statutory and constitutional concerns. For this reason, many scholars anticipated the decision as one that would have "far reaching implications." Wexler, *supra* note 11, at 2068. *See* Joseph Wendell Carlisle, Comment, *What Should We Do with Them: The Supreme Court Answers the "Very Different Question" of Inadmissible Aliens and 8 U.S.C.A. Sec. 1231(A)(6)*, 34 CUMB. L. REV. 561, 594 (2004) ("The Court's ultimate decision will affect not only the fate of *Mezei* and *Zadvydas*, but also the fate of unremovable inadmissible aliens."); Susan Marx, Comment, *Throwing Away the Key: The Constitutionality of the Indefinite Detention of Inadmissible Aliens*, 35 TEX. TECH L. REV. 1259, 1261 (2004) ("The concept of indefinite detention inherently contains both statutory and constitutional problems, as well as legitimate questions concerning public policy and human rights issues."); Wexler, *supra* note 11, at 2071 ("If the Supreme Court does decide, in [*Clark*], to extend the holding of *Zadvydas* to parolees based on a finding of constitutional protections for inadmissible aliens, then it will perforce refashion the plenary power doctrine as well as the entry fiction doctrine.").

statutory interpretation,[127] with each suggesting that its ruling restricting the detention of inadmissible aliens would be different if the governing statute made a clearer distinction between types of aliens.[128] Justice Scalia's dissent in *Zadvydas* advocated treating removable and inadmissible aliens similarly under the federal detention and removal statute; contrary to the result in *Clark*, however, Justice Scalia would have held that the statute allows the Secretary to indefinitely detain *both* categories of aliens.[129] Justice Scalia wrote for the majority in *Clark* and likewise sought to harmonize treatment of two categories of aliens between which the statute did not distinguish. This time, however, since *Zadvydas* had extended protection to one group, harmonizing treatment of the two groups for Scalia meant extending protection to both in *Clark*. The *Clark* opinion is limited in that the protection granted inadmissible aliens was conferred reluctantly through statutory interpretation. The Fifth Amendment was nowhere mentioned in *Clark*. The Supreme Court steered clear of the path suggested by the Sixth Circuit in *Rosales-Garcia* and accepted the assertion that the constitutional concerns that dictated the result in *Zadvydas* "are not present for aliens, such as Martinez and Benitez, who have not been admitted to the United States."[130]

The *Clark* Court stopped just short of inviting Congress to correct § 1231(a)(6) to allow indefinite detention of inadmissible aliens. The Court stated that if Congress "fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed," it "can attend to it."[131] Contrary to Justice Thomas's assertions about Congress's inability to overrule the Court's decisions, recent developments suggest that Congress is in fact able to "attend to" the level of protection given immigrants' rights. Indeed, Congress has already made post-*Zadvydas* modifications in the Secretary's authority to detain aliens after the removal period. As Justice O'Connor noted in her *Clark* concur-

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[127] The Ninth Circuit stated, "we recognize that the result might be different were this a constitutional question." Xi v. INS, 298 F.3d 832, 834 (9th Cir. 2002). Justice Thomas contrarily asserted that interpretations of § 1231(a)(6) that address constitutional concerns are statutory holdings "in name only"; far from avoiding constitutional questions, the *Clark* Court took them "head on." *Clark*, 125 S. Ct. at 737 (Thomas, J., dissenting).

[128] This reasoning reflects the plenary power doctrine. *See supra* note 10. The *Zadvydas* Court explicitly allowed for this possibility by noting that "despite this constitutional problem, if Congress has made its intent in the statute clear, we must give effect to that intent." Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (internal quotation marks omitted).

[129] Justice Scalia, joined by Justice Thomas, argued that "[i]nsofar as a claimed legal right to release into this country is concerned, an alien under final order of removal stands on an equal footing with an inadmissible alien at the threshold of entry: He has no such right." *Zadvydas*, 533 U.S. at 703 (Scalia, J., dissenting). Justice Scalia went on to state that "Congress undoubtedly thought that both groups of aliens—inadmissible aliens at the threshold and criminal aliens under final order of removal—could be constitutionally detained on the same terms, since it provided the authority to detain both groups in the very same statutory provision." *Id.* at 705 (Scalia, J., dissenting).

[130] *Clark*, 125 S. Ct. at 723–24.

[131] *Id.* at 727.

rence, shortly after *Zadvydas*, a provision of the USA PATRIOT Act authorized continued detention beyond the removal period for renewable successive periods of six months for any alien "whose removal is unlikely in the reasonably foreseeable future . . . if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[132] Because the Court all but invited Congress to clarify § 1231(a)(6) to expand the executive's authority to detain, the protection *Clark* affords inadmissible aliens is at best fragile.

Further qualifying *Clark*'s protections is that the Court left intact the Secretary's authority to indefinitely detain inadmissible aliens on overbroad security grounds. First, according to the Court, interpretations of § 1231(a)(6) do not affect the detention of alien terrorists "for the simple reason that sustained detention of alien terrorists is a 'special circumstance.'"[133] The Secretary's authority to indefinitely detain inadmissible aliens for more general security reasons also remains untouched by *Clark*. The broad language of the USA PATRIOT Act, unqualified by the Court, allows the Secretary to remove aliens which it determines to be a threat to "the safety of the community or any person."[134] The danger of such broad language is that the definition of a security threat or risk is expansive enough to include the very presence of illegal aliens.

The ambiguity of what constitutes a threat to security or a risk "to the safety of the community" puts any protection afforded inadmissible aliens by *Clark* on shaky ground. The *Clark* Court suggested that the very presence of inadmissible aliens, such as Mariel Cubans, could qualify as a security threat. In allowing the potential for Congress to clarify removal laws to allow for the indefinite detention of inadmissible aliens, the Court suggested a possible justification: "that the security of our borders will be compromised if [the government] must release into the country inadmissible aliens who cannot be removed."[135] According to prior Supreme Court decisions, however, the only two possible special justifications for the deprivation of liberty involved in indefinite civil detention under the federal detention and removal statute are preventing flight and protecting the

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[132] 8 U.S.C. § 1226a(a)(6) (2000 & Supp. II 2002); *see also Clark*, 125 S. Ct. at 727 n.8; *id.* at 728 (O'Connor, J., concurring).

[133] *Clark*, 125 S. Ct. at 723 n.4.

[134] "An alien detained . . . whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6) (2000 & Supp. II 2002).

[135] *Clark*, 125 S. Ct. at 727; *see also supra* note 10. According to the government in *Clark*, the Secretary's authority to detain aliens subject to removal is justified by a series of "critical interests" relating to the "dilemma of recidivist criminal aliens," the incentives that lax immigration policy creates for prospective immigrants to undertake risky migrations to the United States, the threat of foreign powers or rogue dictators engineering another Mariel Boatlift, and the "insinuation of dangerous individuals" into the United States across our borders. Reply Brief for the Petitioners at 14–16, *Clark* (No. 03-878).

community.[136] The *Zadvydas* Court found neither justification sufficiently strong to justify indefinite detention of removable aliens.[137] First, it held that where removal is a remote possibility, the justification of preventing flight is "weak or nonexistent."[138] The second justification, protecting the community, is limited to specially dangerous individuals.[139] This leaves the alien's removal status itself as the only justification for indefinite detention. However, since this status bears no relation to a detainee's dangerousness, protecting the community from inadmissible aliens is unsatisfactory as a justification for their detention.[140] Nonetheless, the *Mezei* distinction between inadmissible and admissible aliens suggests that the analysis of an inadmissible alien's liberty interest would be different. The distinction leaves the door open for the Court to consider the feared "release into the country" of "inadmissible aliens who cannot be removed"—that is, their very presence—as a sufficient governmental justification for indefinite detention.[141] Particularly alarming in this regard is an endorsement of this view by Justice Kennedy, supported by Chief Justice Rehnquist and Justices Scalia and Thomas, in his *Zadvydas* dissent. He suggested that one policy reason for refraining from placing limits on the indefinite detention of aliens under § 1231(a)(6) is the prospect of detained inadmissible aliens being "set free in our community."[142] Such justifications draw upon anti-immigrant attitudes. For this reason they are troubling, illuminating the Court's strong reluctance to protect the civil rights and civil liberties of immigrants.[143] Broad justifications for detention of the type alluded to in Justice Kennedy's dissent are especially unconvincing when applied to Mariel Cubans, whose emigration to the United States during the Cold War was openly encouraged for humanitarian and political reasons and was welcomed by the Carter Administration with "open heart and open arms."[144] In the current political climate where the line between matters of national security and matters

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[136] Zadvydas v. Davis, 533 U.S. 678, 690–92 (2001) (citing United States v. Salerno, 481 U.S. 739, 748–60 (1987) (recognizing prevention of flight and concern for the safety of citizens as compelling government interests justifying pretrial detention provisions)).

[137] *Id.* at 690.

[138] *Id. But cf.* Demore v. Hyung Joon Kim, 538 U.S. 510, 518–22 (2003) (stating that even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight of about 20%).

[139] *Zadvydas*, 533 U.S. at 691 (citing *Salerno*, 481 U.S. at 747 ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes.")).

[140] *Id.* at 693.

[141] *Clark*, 125 S. Ct. at 727.

[142] *Zadvydas*, 533 U.S. at 716 (Kennedy, J., dissenting).

[143] Such reluctance is very likely to continue to affect the status of immigrants as a whole in coming years. Other immigrant groups, such as undocumented persons, had "a lot to gain or lose from the . . . Supreme Court review [of the status of parolee detention]." Wexler, *supra* note 11, at 2077. Wexler predicts that "three years from now, [the Supreme Court] may need to review a case with similar facts to *Zadvydas* and [*Clark*], but this time involving an undocumented alien." *Id.* at 2070.

[144] RIVERA, *supra* note 4, at 10.

of immigration is often blurred,[145] the urgency of strengthening protections of the rights and liberties of immigrants only grows.

[145] *See* Sergio Bustos, *Secure Borders First, Then Tackle Immigration, Lawmaker Says*, GANNET NEWS SERVICE, Jan. 27, 2005, *available at* http://www.usatoday.com/news/washington/2005-01-26-immigration-reform_x.htm?POE=NEWISVA.