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Mark R. Von Sternberg

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THE PLENARY POWER IN A HUMAN RIGHTS PERSPECTIVE

Mark R. von Sternberg*

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* Mark R. von Sternberg is Senior Attorney at the Catholic Legal Immigration Network, Inc., where he concentrates on litigation before the Immigration Courts and the Board of Immigration Appeals. Since January 1999, Mr. von Sternberg has also served as an adjunct faculty member at Pace University School of Law where he teaches general immigration law. Mr. von Sternberg received a J.D. degree from Vanderbilt University School of Law in 1973 and an LL.M. degree (in international legal studies) from New York University School of Law in 1984. Mr. von Sternberg has lectured in law schools and at professional associations regarding immigration matters and has written extensively, particularly in the areas of refugee law, international humanitarian law, and human rights. Mr. von Sternberg is the author of a recently published treatise regarding the refugee definition as applied in the U.S. and Canada. In 2002, he received the American Immigration Lawyer's Association (AILA) Pro Bono Award.

I. INTRODUCTION

The Bush Administration has repeatedly acted on its view that the September 11 events justify it in taking drastic measures not only against those suspected of conspiring in the attacks, but also as concerns immigration generally. In doing so, the government is drawing upon a long-established, but controversial doctrine giving it "plenary" (i.e., largely meta-constitutional) power to deal with immigration. This paper will focus not so much on what the Administration has done, but rather on recent efforts, mostly by the courts, to check the further growth of the plenary power. As will be shown, developments here are mixed; the legal environment surrounding the courts' doctrinal outlook is still evolving.

By placing the question in perspective, however, it can be seen that major historical themes are playing themselves out in U.S. immigration law. These center upon the historical power of the United States to deal with the problems generated by immigration in ways that are, at least partially, beyond the Constitution and relatively unconfined by principles of general international law. Opposed to this has been the judicial response which, at least in a modern context, has attempted to view the immigration power as operating within a broader framework of domestic and international human rights.

The paper begins by outlining the plenary power doctrine as developed by the courts. It then examines the Supreme Court's revolutionary holding in *Zadvydas v. Davis*,[1] as it affects Immigration and Naturalization Service ("INS") detention policies. The rights of lawful permanent residents with criminal convictions are explored both with respect to the government's policies subjecting them to detention and retrospectively imposing on them the consequences of new legislation. The implications of recent human rights intervention by the courts are analyzed, both as concerns the government's detention regulations and the USA PATRIOT Act. The paper also analyzes the President's order authorizing "military commissions" to try those who may be associated in some way with acts of terrorism and the problems raised by Chief Immigration Judge Michael Creppy's order mandating "secret" proceedings for certain kinds

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

of cases. A further segment of the paper looks briefly at the situation of detained asylum seekers. The events of September 11 have unquestionably aggravated this situation, and (temporarily) frustrated the spirit of reform. Finally, the new policies are evaluated in the context of the United States' historical commitment to "human rights and humanitarian concerns."[2]

II. The "Plenary Power" in Context: Aliens Subject to a Final Order of Removal and the Issue of Detention

The initial sections of this paper will analyze recent developments affecting the power of the government to detain noncitizens in ways which are, at least in part, beyond constitutional and human rights control. Here, the focus will be on the growing specter of indefinite detention for aliens who, although ordered removed, cannot be removed in practice (because, for instance, there does not exist a repatriation agreement with the country of nationality), and specific mandatory rules which require detention for certain criminal aliens while their hearings remain pending.[3]

The problem of indefinite detention is an old problem, not a new one. As long ago as the 1950s, the Supreme Court set forth its view that indefinite detention was a constitutional possibility, at least for those permanent resident aliens who were "seeking admission" – i.e., those who had absented themselves from the United States and were now applying to reenter. In *Ex rel Mezei*,[4] and decisions following it, the Supreme Court found

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[2] *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 101, 102 (1980) (codified as Congressional Declaration of Policies and Objectives, 8 U.S.C. § 1521 (1982)); S. Rep. No. 256, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Admin News 141, 141.

[3] Also relevant to this discussion is the plight of criminal aliens who have been the subject of what amounts to retrospective legislation, and those threatened with trial in "military commissions" largely as the result of their alleged involvement with acts of terrorism. See discussion *infra* Section IX of this essay.

[4] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). In *Mezei*, a 1953 decision, the court found itself confronted with the case of a foreign national, born in Gebralter of Rumanian of Hungarian parents. Mezei went home to visit his mother in Rumania, and was detained on his way back to the United States by Hungarian authorities. He was stopped when he reached Ellis Island, and his detention threatened to be indefinite since there was no State ready and willing to accept him upon removal. *Id.* at 208-09.

that the U.S. Constitution does not have "extra-territorial" application so as to extend protection to such aliens.[5]

Such results are consistent with the long accepted doctrine that the immigration power does not have specific constitutional foundations, resting instead on international law principles[6] – namely, the power of the United States to act as a nation among nations in an ordered community of States. The power to control its borders is a natural appurtenance of sovereignty, a power which the nation must possess if it is to be regarded as a "State" under international law.[7] The absence of a constitutional foundation for the immigration power, however, has led the courts to view this power as not being delimited by the normal constitutional restraints.[8] Immigration laws, in a sense, evolved in a comparative constitutional vacuum. This reduced level of constitutional control came to be known as the "plenary power" doctrine.[9]

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[5] *Id.* at 214-16.

[6] Chae Chan Ping v. United States, 130 U.S. 581, 609-10 (1889) (Chinese Exclusion Case) (holding that Congress has plenary power, even in times of peace, to exclude aliens from or to prevent their return to the United States for any reason).

[7] *Id.* at 604.

[8] Accordingly, the courts have historically held that legislation which might otherwise be viewed as an impermissible *ex post facto* law (by creating new grounds of inadmissibility applicable to prior acts of the alien, for instance, and which could lead to an alien's removal) was not constitutionally precluded. *See, e.g.,* T. Alexander Aleinikoff, *The United States Constitution in its Third Century: Foreign Affairs Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 862-63 (1989). Moreover, when the Court upholds the exclusion of Chae Chan Ping from the United States, it also holds that the statute leading to exclusion displaces an earlier treaty which would have given the alien a reentry permit. *The Chinese Exclusion Case*, 130 U.S. at 600. It is thus a curious interpretation of international law which the Court upholds: one which grants unfettered powers while ignoring the normative standards of international law to which the sovereign would otherwise be bound. In any case, the decision rejects, so far as the "plenary power" is concerned, the chief feature of Enlightenment political philosophy: that sovereignty is limited ("limited monarchy") and that, to be justified, power must be based on a stated public interest and its exercise must be proportional to that interest. *See generally* Ming-sung Kuo, *The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases Revisited*, 67 ALB. L. REV. 27, 76-78 (2003). For a discussion of the Chinese Exclusion Case, *see* STEVEN H. LEGOMSKY, IMMIGRATION AND REFUGEE POLICY 13-24 (3d ed. 2002).

[9] *See, e.g.,* Zadvydas v. Davis, 533 U.S. 678, 695 (2001). *See also* IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE (2d ed. 1981) (chapter 6 describing grounds for deportation under Congress' plenary powers).

In the summer of 2001, the "plenary power" doctrine received an important judicial check. The Supreme Court rendered its revolutionary decision in *Zadvydas v. Davis*,[10] in which it held that aliens who had received orders of removal, but who could not be deported to any country on account of the absence of repatriation agreements with the home state, were entitled to be released at the end of six months.[11] This ruling sharply delimited the concept of "plenary power" as applied up to that point. The Court noted, among other things, that the aliens had in fact been admitted, and were not applying for admission. *Zadvydas* is not a constitutional decision, but is one of statutory construction. The Court found that the result it reached was necessary in order to avoid a grave constitutional issue or a potential violation of general international law.[12]

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[10] Zadvydas v. Davis, 533 U.S. 678 (2001). *Zadvydas* actually entailed review of two circuit court decisions: Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) and Ma v. Reno, 208 F.3d 815 (9th Cir. 2000). Zadvydas had been born in Germany of Lithuanian parents, and both Germany and Lithuania had refused to accept him. *Zadvydas*, 533 U.S. at 685. Ma had been born in Cambodia which has no repatriation agreement with the United States. *Id.* at 685-86.

[11] *See* Immigration and Nationality Act [hereinafter INA], §§ 241(a)(1), (6), 8 U.S.C. § 1101 *et seq.* (2000). The Court was construing §§ 241(a) (1) and (6) which provide for a 90 day removal period where the non-citizen becomes subject to a final order, but with an additional unspecified period in certain cases involving criminal aliens where the non-citizen either would not cooperate with the removal order or would constitute a threat to the community if permitted to remain.

[12] *Zadvydas*, 533 U.S. at 695. This was certainly made explicit in *Ma*, 208 F.3d 815, a decision which was also reviewed by the Court in *Zadvydas*. Among other things, the Ninth Circuit in *Ma* ruled:

> In interpreting the statute to include a reasonable time limitation, we are also influenced by amicus curiae Human Rights Watch's argument that we should apply the well-established *Charming Betsy* rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law. [*Id.* at 829-30].
>
> * * *
>
> Although Congress may override international law, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations. [*Id.* at 830].
>
> On the rule of customary international law proscribing indefinite detention, see Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (9th Cir. 1981):
>
> It seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment. [*Id.* at 1388].

Using constitutional jurisprudence and the doctrine of proportionality, the Court opined that the six-month limit was a "rule of reason" – one which was proportional to the showing of State necessity and which would prevent the statute from being unlawful as applied.[13] The Court noted that monitoring of the alien in a half-way house while he or she continued to comply with INS reporting requirements was a more measured way to satisfy public interests.[14] The Court indicated that its "rule" would be appropriate in most instances, but it specifically added that it did not have a case of "terrorism" before it.[15]

In the wake of the September 11 attacks, the Attorney General has adopted regulations that vitiate, in large measure, the Court's remedial ruling in *Zadvydas v. Davis*.[16] To begin with, although the Supreme Court's decision was not exactly clear on this point, the Attorney General's interim regulations provide that the protections of the *Zadvydas* case do not apply to aliens who are seeking admission, only to those who are actually admitted to the United States.[17] (An exception exists for one particular class of inadmissible aliens: those who have entered

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[13] *Zadvydas*, 533 U.S. at 701.

[14] *Id.* at 699-702.

[15] *Id.* at 696.

[16] *See, e.g.,* 8 C.F.R. § 241.4 (2004) (regarding the continued detention of aliens). Although these regulations were promulgated by the Attorney General for enforcement by the Immigration and Naturalization Service [hereinafter INS], the new rules will now be administered by the Department of Homeland Security [hereinafter DHS] through the United States Immigration and Customs Enforcement [hereinafter USICE]. *See* Stanley Mailman & Steven Yale-Loehr, *Immigration Functions in the Department of Homeland Security*, 8 BENDER'S IMMIGRATION BULLETIN 663 (Apr. 15, 2003).

[17] It is important to note that the Sixth Circuit has ruled that the protections crafted in *Zadvydas* apply both to deportable and to inadmissible aliens. *See* Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003), *cert. denied sub nom.* Snyder v. Rosales-Garcia, 123 S. Ct. 2607 (2003). The Sixth Circuit's decision draws upon the opinion of the dissenting justices in *Zadvydas* noting, among other things, that the statutory section under analysis, INA § 241(b)(6), does not distinguish between inadmissibility and deportability. *Id.* at 405. See also Xi v. U.S. I.N.S., 298 F.3d 832 (9th Cir. 2002) for a similar result. *But see* Borrero v. Aljets, 325 F.3d 1003, 1007 (8th Cir. 2003). It should be mentioned here that both the Sixth and the Ninth Circuits would have been better served by adopting the rule of statutory construction announced in Murray v. Charming Betsy (The Charming Betsy Case), 6 U.S. 64 (1804) to the effect that Congress will not be presumed to legislate in violation of customary international law. *Id.* at 118. Unlike the U.S. Constitution, international law does have extraterritorial effect.

without having been admitted or paroled.)[18] Moreover, under the regulations certain classes of aliens are completely exempt from the prophylactic rules set up by the Court. These include those who are inadmissible because of contagious diseases posing a public threat, serious adverse foreign policy consequences, threats to national security (such as terrorism), or those individuals having a dangerous personality disorder or who have been convicted of a crime of violence having public safety implications.[19]

The exemption of these classes from the protection of *Zadvydas* is highly questionable. Zadvydas (and Ma whose case was decided as a companion case to that of *Zadvydas*) had significant criminal law violations in his past which might well have raised public safety implications.[20] The Attorney General's adoption of an absolute preclusion of such aliens from release counters the clear message of *Zadvydas* that a case-by-case analysis be used.

Of equal magnitude, the regulations do not adopt the Supreme Court's mandate that, in most instances, a six-month period is sufficient to determine whether an alien can in fact be removed. Instead, the rule provides for a six-month review period in which the Department of Homeland Security ("DHS") examines whether removal is in fact likely within the reasonably foreseeable future.[21] Furthermore, the alien's confinement may be extended indefinitely as long as specific circumstances exist, such as the alien's failure to comply with the removal order by seeking a passport or other relevant travel documents.[22]

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[18] 8 C.F.R. § 241.13(b)(3) (2004).

[19] See 8 C.F.R. § 241.14 providing for continued detention of removable aliens on account of special circumstances.

[20] These exceptions are especially questionable in light of the fact that both Ma and Zadvydas had criminal convictions, – Zadvydas for possession of cocaine with intent to distribute and Ma for manslaughter arising out of a gang-related killing. *Zadvydas*, 533 U.S. at 684-85. Surely when the language of the Supreme Court is looked to (indefinite detention is justified only for a very narrow class of particularly dangerous criminals, terrorists for instance), – the regulations would appear on their face to be overbroad.

[21] 8 C.F.R. § 241.13(b)(2)(ii) (The Department has no obligation to release an alien until it has had the opportunity during a six-month period to make its determination as to whether there is a significant likelihood of removal in the reasonably foreseeable future).

[22] 8 C.F.R. § 241.13(e)(2). The new rule has statutory underpinnings in INA § 241(a)(1)(C). Nonetheless, exceptions which would have accommodated the situa-

Because most aliens, while in confinement, find it extremely difficult to secure official documentation from their home countries, the regulations seem far from reasonable. Furthermore, many aliens may find themselves in the position that Ma was in: they have been admitted as refugees or granted asylum (and thus have shown a well founded fear of being persecuted in the home State), but have committed a criminal act in the United States. As a result, the alien's refugee or asylum status ends and the alien is subject to an order of removal.[23] It is simply unfair and unrealistic to ask aliens to seek travel documents from a State in which they fear serious harm on a discriminatory basis.

Moreover, the INS may frustrate the six-month release period by finding that the alien will likely be removed in the future, but that a final determination may take longer than six months. The alien may counter the INS's findings by showing that removal to the country in question has not been successful in the past. Placing the burden on the alien in such circumstances is a marked departure from the remedial view of *Zadvydas* that the INS has the burden of showing that removal is practicable and foreseeable, and that failure to exercise the removal power within a six-month period is an indication that removal is not reasonably foreseeable and that the alien should be released.

Other regulations depart from *Zadvydas* in more significant ways.[24] For example, the federal regulation regarding custody procedures provides that the period within which the government may place the alien in removal proceedings (normally forty-eight hours) may be extended, in extraordinary cases, by an "additional reasonable period of time."[25] This provision essentially reposes unfettered discretion in the DHS to hold non-citizens on an indefinite basis while considering whether or not to serve them with a Notice to Appear (the relevant charging document).

tions outlined in the text would have made the regulation a more reasonable exercise in rule-making and would have more clearly adopted the prevailing spirit of the *Zadvydas* decision.

[23] *See* 8 C.F.R. § 241.13(a)(1).

[24] *See generally* Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001), *amending* 8 C.F.R. § 287.3(d).

[25] *Id.* The regulation raised the previous time limit which had been 24 hours.

Notwithstanding the Attorney General's preclusive approach in his detention regulations, the federal courts initially continued to draw upon the *Zadvydas* decision and to press for limits on the plenary power doctrine. The focus of judicial attention – as shown below in *Patel v. Zemski*[26] and *Kim v. Ziegler*[27] – was Immigration and Nationality Act ("INA") § 236(c), a section mandating detention of non-citizens convicted of certain crimes during the pendency of their hearings.[28] Although the holding of these cases is clearly no longer the law in light of the Supreme Court's decision in *Demore v. Hyung Joon Kim*,[29] they will be analyzed here as expressive of plausible rationales which could well be followed by federal courts where detention issues other than those arising under INA § 236(c) come under review.

In *Patel v. Zemski*, the Third Circuit Court of Appeals found the mandatory detention provided for under INA § 236(c) unconstitutional on due process grounds.[30] Patel had been convicted of "harboring" an alien by employing him and giving him a place to live.[31] The INS contended that this was an "aggravated felony," in that it was a crime "related to alien smuggling."[32] Patel challenged this determination by seeking a writ of habeas corpus.[33] He also continued to challenge the characterization of his crime as an "aggravated felony" in related legal proceedings.[34]

The Third Circuit followed the lead of *Zadvydas* in holding that once an alien is admitted constitutional protections apply.[35] The court continued to defer to the broad "plenary power" of the government to regulate the admission of aliens, but said that implementation of that power must be by constitutional

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26 Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001).

27 Kim v. Ziegler, 276 F.3d 523 (9th Cir. 2002).

28 *See* INA § 236(c) (codified at 8 U.S.C. § 1226(c) (2000)) (providing for the mandatory detention of criminal aliens).

29 Demore v. Hyung Joon Kim, 538 U.S. 510 (2003).

30 *Patel*, 275 F.3d at 311-14. The types of criminal convictions mandating detention under INA § 236(c) include, *inter alia*, those relating to aggravated felonies. § 236(c)(1)(B).

31 *Patel*, 275 F.3d at 303.

32 *Id.* at 304.

33 *Id.*

34 *Id.*

35 *Id.* at 307.

means.[36] Continued detention infringed upon the alien's fundamental liberty interest of remaining free from physical restraint.[37] That being so, the government to justify its detention practices had to show that they were based on a definable public interest and that such continued detentions were proportional to that interest.[38]

The INS asserted that its detention practices were necessary to prevent aliens, such as Patel, from fleeing INS jurisdiction and absconding prior to trial.[39] The court observed that the concerns put forward by INS were largely contradicted by their own statistics regarding the flight patterns of aliens in Patel's situation.[40] The Third Circuit also held that Patel's flight risk had to be determined in an individualized hearing. In *Patel*, we find the key notion of proportionality between stated public purposes and the ensuing restraint as the hallmark of human rights jurisprudence. The *Patel* court's holding clearly reflected the course set by the *Zadvydas* decision and, for a time, it was hoped that the courts would be operating in a new environment of effective judicial control over the plenary power doctrine.

The Ninth Circuit reached a similar result in *Kim v. Ziegler*, in which it held that INA § 236(c) was unconstitutional as applied. The Ninth Circuit declined to rule that the statute was unconstitutional on its face in light of the fact that it applied both to aliens who had entered the United States and those who were still seeking admission.[41] The latter class would not necessarily be protected, according to the appeals court, under the *Zadvydas* rationale.[42] In *Kim,* the alien was a native and citizen of Korea who had been admitted as an Lawful Permanent Resident ("LPR") at the age of eight.[43] At age eighteen, he was convicted of first degree burglary and, one year later, of "petty theft with priors" – the latter offense constituting an aggravated fel-

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[36] *Id.* at 307-08.

[37] *Id.* at 308.

[38] *Id.* at 310-11.

[39] *Id.* at 312.

[40] *Id.* at 312 n.9 (citing I.N.S. contracted study by the Vera Institute finding high success rates in a pilot program allowing for the supervised release of individuals in removal proceedings, including criminal aliens).

[41] *Kim*, 276 F.3d at 527.

[42] *Id.* at 527-28.

[43] *Id.* at 526.

ony.[44] After his release from State custody, he was confined by the INS based on INA § 236(c).[45]

The Ninth Circuit adopted the proportionality test advanced in *Zadvydas*, and followed in *Patel*, whereby the alien's liberty interest is balanced with the State's interest in detention. Lawful Permanent Residents, the court ruled, have significant interests which are patently defeated by the mandatory detention spelled out in INA § 236(c).[46] Among other things, such aliens often have family and business concerns which would be adversely affected by the alien being kept in confinement while awaiting a removal hearing.[47] Not allowing the individual to wind up his or her business and family affairs would work a disservice not only to the alien but to all of those who depended on the alien.[48] Accordingly, the court ruled that the INS may confine aliens prior to removal proceedings, but the agency must hold a bail hearing with reasonable promptness to determine whether the alien is a flight risk.[49]

On June 28, 2002, the Supreme Court granted certiorari in the *Kim* case.[50] The question addressed to the Court was whether respondent's mandatory detention under INA § 236(c) violates the Due Process Clause of the Fifth Amendment, where respondent was convicted of an aggravated felony after his admission to the United States. Oral argument was heard on the case on January 15, 2003. In a decision of considerable scope, the Supreme Court reversed the Ninth Circuit ruling and held that mandatory pre-trial detention does not offend the Fifth Amendment's Due Process Clause.[51]

The Court deferred to the legislative presumption that aliens convicted of certain types of crimes constituted flight risks. Of precedential weight was the Court's earlier opinion in *Carlson v. Landon*, in which it upheld a similar challenge to encompassing legislative findings that members of the Communist Party constituted flight risks and should, therefore, be

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[44] *Id.*
[45] *Id.*
[46] *Id.* at 528.
[47] *Id.* at 529.
[48] *Id.*
[49] *Id.* at 531-35.
[50] Demore v. Kim, 536 U.S. 956, 122 S. Ct. 2696 (2002) (mem.).
[51] Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 1713 (2003).

made the subject of mandatory detention.[52] Also found governing was the opinion in *Reno v. Flores*, in which the Court had upheld a regulatory scheme requiring that juveniles be released only into the care of their parents, guardians, or adult relatives.[53] The Court also noted the findings of the Vera Institute, which determined that about 23% of aliens actually released from detention failed to appear for their immigration hearings.[54]

The Court distinguished *Zadvydas* on two essential grounds. *Zadvydas*, the Court found, had been concerned with indefinite detention, whereas aliens detained under INA § 236(c) were confined for comparatively shorter periods of time.[55] A more salient ground for the decision was provided by the Court's conclusion that in *Kim*, as opposed to *Zadvydas*, there was a rational relationship between detention and removal.[56] Under INA § 236(c), detention of the alien was justified because of the likelihood of removal. No such rational relationship was made out in *Zadvydas*, where the Court concluded that INA § 241(a)(6) (providing for an unspecified period of detention) would apply irrespective of the likelihood of removal.[57] Indeed, the Court's earlier opinion in *Zadvydas* centered around crafting rules under which release would become mandatory once removal appeared impossible. Hence, the required showing that there be a rational relationship between removal and detention is one which survives *Kim*. It is against this yardstick, it is submitted, that future statutory and regulatory regimes will be assessed.[58]

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[52] Carlson v. Landon, 342 U.S. 542 (1952).

[53] Reno v. Flores, 507 U.S. 292 (1993).

[54] *Kim*, 123 S. Ct. at 1715-16.

[55] *Id.* at 1720. The Court's assessment of how long such individuals must wait while their cases are winding towards a conclusion – a "few months at most" – was probably highly optimistic in light of current litigation realities. Indeed, between trial, administrative appeal, and judicial review, the process may well take up to at least a year.

[56] *Zadvydas*, 533 U.S. at 1719.

[57] *Kim*, 123 S. Ct. at 1719-22.

[58] An extremely strong opinion by Justice Souter, concurring in part and dissenting in part, contends that Kim never conceded his deportability since he intended to apply for withholding of deportation under INA § 241(b)(3). The opinion also goes on to challenge the majority's finding that Kim's detention will be of short duration and stresses that the main thrust of *Zadvydas* had been the need for an individualized determination on whether the respondent posed a threat to the

III. *Zadvydas* and *Kim* and Issues Arising Under New Detention Regulations and Under the USA PATRIOT Act

The Supreme Court's decision in *Demore v. Kim* will unquestionably have some bearing on other fresh legal developments – most notably the Attorney General's new detention regulations[59] and the USA PATRIOT Act.[60] As noted earlier, interim detention regulations seek to implement *Zadvydas* by establishing rules for determining whether a non-citizen's removal in the near future is likely.[61] The rules require an initial determination by the Department of Homeland Security ("DHS") in this respect.[62] If removal is found to be likely, detention is to continue subject to a six-month periodic review.[63] If removal is found to be non-likely, the non-citizen is to be released subject to conditions which, if violated, result in the alien being taken back into custody.[64]

These regulations would appear subject to the full scope of the protections crafted in *Zadvydas*, and would seem relatively unaffected by the new direction taken in *Kim*. Such a conclusion is particularly justified by the *Kim* Court's refusal to disturb the essential rationale of its earlier ruling in *Zadvydas* that there be a reasonable relationship between detention and removal for a detention policy to withstand review — at least

community or constituted a flight risk. The unreasonableness of detention in this instance was heightened by the fact that the immigration judge had already determined that Kim was neither. *See Kim*, 123 S. Ct. at 1719-22.

[59] *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001), amending 8 C.F.R. § 241.13(i).

[60] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA Patriot Act].

[61] *See* 66 Fed. Reg. at 56,968.

[62] *Id.*

[63] *Id.*

[64] Also as noted earlier, certain classes are held to be detainable indefinitely irrespective of their possible removal, including non-citizens (1) having highly contagious diseases; (2) posing serious foreign policy consequences; (3) raising risks of terrorism; and (4) who have been convicted of violent crimes or have mental conditions. These exemptions were clearly crafted with a view to the Court's finding in *Zadvydas* that it was not dealing with a situation involving terrorists. Whether these exceptions strike a legitimate balance between the need for individual determinations and the public interest concerns of detention is likely to be litigated. Also exempt, under the regulations, are aliens who are deemed inadmissible (including "arriving aliens" and aliens who have been paroled but excluding non-citizens who have entered without inspection). *See* 8 C.F.R. § 241.13.

where sweeping legislative or regulatory presumptions are made.[65] Clearly covered by the new *Zadvydas* protections are aliens who have been "admitted" and are thus deportable rather than inadmissible.[66] Also included would be aliens who have been granted asylum or those "admitted" in any other form of status.[67] At a minimum, these non-citizens should be able to put forward constitutional protections in connection with their claims to release where more than minor periods of detention are involved. In light of the fact, moreover, that the Supreme Court has denied certiorari in *Rosales-Garcia*,[68] a sound argument can be advanced that similar protections should be extended to inadmissible foreign nationals as well.

The *Zadvydas* protections will also play a major role in interpreting the scope of the USA PATRIOT Act. It must be mentioned on the salutary side that, under that statute, the Attorney General has seven days in which to determine whether or not to charge the alien.[69] This provision arguably "trumps" earlier September 17, 2001 detention regulations providing for service of a charging document within a reasonable period of time for as long as the Attorney General, in his discretion, deemed appropriate.[70]

However, the USA PATRIOT Act contains other provisions which are highly disturbing. These include a procedure whereby the Attorney General may "certify" that the respondent is a "terrorist" or has engaged in other activity which threatens the national interest.[71] There are no clear procedures specified in the Act as to how the Attorney General makes this determination. The only requirement is that there must exist reasonable cause.[72] The statute provides for habeas corpus re-

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[65] *Zadvydas*, 533 U.S. at 701.

[66] *See* 66 Fed. Reg. at 56,969.

[67] *Id.*

[68] *See* Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003), *cert. denied sub nom.* Snyder v. Rosales-Garcia, 123 S. Ct. 2607 (2003) (holding of Zadvydas v. Davis, that provision authorizing post-removal-period detention of removed aliens contains implicit reasonable time limitation, applies to aliens who are removable on grounds of inadmissibility).

[69] USA Patriot Act, *supra* note 60, § 412(a).

[70] *Compare* 66 Fed. Reg. 48,334 (Sept. 20, 2001), *amending* 8 C.F.R. § 287.3(d) (2001).

[71] USA Patriot Act, *supra* note 60, § 412(a)

[72] *Id.*

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view (to be initiated in the Supreme Court, the D.C. Court of Appeals, or any district court otherwise having jurisdiction), but an appeal may be heard only in the D.C. Court of Appeals.[73]

Once the "terrorist" determination is made, however, the alien may be detained indefinitely, irrespective of whether he or she qualifies for or is granted lasting immigration relief such as political asylum.[74] Under these conditions, detention itself must be seen as violating the standards set down by *Zadvydas*, mandating that an asylee may not be removed and has the lawful right to remain in the United States.[75] At this point, the United States' interest in removal must be seen as non-existent or even illegitimate.[76] The vagueness of the "terrorism" definition has also raised concerns. One commentator has remarked that a wife could be detained who threatened her husband with a kitchen knife in a domestic dispute.[77]

In the case of aliens who have received orders of removal and who cannot be removed to another country, the Act provides that their cases are to be reviewed in six-month increments, detention being justified only where the Attorney General shows that release of the alien would jeopardize national security "or the safety of any individual or community."[78]

The USA PATRIOT Act's detention provisions as they apply to those who have been admitted would appear constitutionally vulnerable under the principles developed in the *Zadvydas* decision. Aliens who are detained despite the fact that they have been granted relief in removal proceedings (or who have been detained in a post-removal context without the possibility of being expelled) based on a vague and unsupported "certification" that they are "terrorists" would seem eligible to attack this conclusion. Under the broad doctrine of recent constitutional jurisprudence (and international human rights jurisprudence) the constraint of a fundamental liberty interest must be justified by a public interest, and must be proportional to that interest. It is difficult to imagine how a valid public interest can be

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[73] *Id.* § 412(b).

[74] *Id.* § 412(a).

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

[76] *Id.*

[77] David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1026 (2002).

[78] USA Patriot Act, *supra* note 60, § 412(a).

ascertained when no clear guidelines exist in the statute defining either the criteria or the procedures under which the Attorney General arrives at the "certification" that an alien is a "terrorist."

IV. First Amendment Issues

A case which clearly adopts the forward-looking approach of the circuit court opinions in *Patel* and *Kim*, but deals with an altogether different issue, is *Detroit Free Press v. Ashcroft.*[79] The *Detroit Free Press* decision concerned an internal memorandum ("The Creppy Memorandum") of the Executive Office for Immigration Review requiring that certain types of cases ("EOIR"), most notably those dealing with aliens suspected of involvement with terrorism, be closed to the public.[80] The EOIR sought application of the secrecy order to the removal proceedings of Rabin Haddad, who was suspected of supplying funds to terrorist organizations.[81] A group of newspapers sought injunctive relief, arguing that the secrecy order offended their First Amendment right of access to Haddad's deportation proceedings.[82] The Sixth Circuit upheld the District Court's entry of injunctive relief.[83] The Government appealed from the injunction arguing that the outcome of the case was governed by *Kleindienst v. Mandel*, a case in which admission of an alien was barred because of his beliefs.[84] The Sixth Circuit found *Kleindienst* not controlling since the present case did not involve, as *Kleindienst* clearly did, a "substantive immigration question."[85] (A "substantive immigration question," for this purpose, is one which has to do with whether the alien is admitted or acquires status.)[86] The *Detroit Free Press* court also noted that deferen-

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[79] Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

[80] *Id.* at 681.

[81] *Id.* at 684.

[82] *Id.* at 683.

[83] *Id.*

[84] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[85] *Detroit Free Press*, 303 F.3d at 687.

[86] *Id.* at 685 n.6. In support of its view, the court cited the case of Wong Wing v. United States, 163 U.S. 228 (1896), in which the Supreme Court struck down, under the Fifth and Sixth Amendments, a criminal statute which rendered it punishable for a Chinese national to remain unlawfully in the United States for one year or more. The criminal proceedings were to be conducted in an administrative summary hearing, which the Court found offensive on due process grounds.

tial review to "plenary power" was being eroded by the Supreme Court in its most recent pronouncements[87] — most critically in its decision in *Zadvydas v. Davis*. Based on the foregoing, the Sixth Circuit ruled that administrative deportation proceedings were sufficiently similar to judicial proceedings, so that it could apply by analogy the two-part "experience and logic" test of *Richmond Newspapers, Inc. v. Virginia*,[88] which assessed the merits of cases claiming First Amendment access rights to different government proceedings.[89] In applying the test, the court found that deportation proceedings had been traditionally open to the public and that public access would enhance the quality of deportation hearings.[90] Openness ensures that the government does its job properly; that it does not make mistakes.[91] Most importantly, the court found that the Creppy Memorandum was not carefully tailored; it did not permit the government to advance its concerns on an individualized basis, but required sweeping treatment of certain classes of cases which share a perceived common element.[92] Thus, the Creppy Memorandum lacked the proportionality to governmental need which has become the hallmark of modern human rights jurisprudence.

However it is viewed, the decision in *Detroit Free Press* constitutes an important victory for those who have argued that the plenary power is subject to constitutional and human rights controls. The application, by analogy, of Justice Brandeis' well-known dictum that "sunlight is the most powerful of all disinfectants"[93] was certainly a timely reminder that there are growing limits to the immigration power, and that courts will no longer be supine where the Government fails to show proportionality between the means it has adopted and the need to combat terrorism.

Not all courts, however, have found themselves in agreement with the rationale of the Sixth Circuit. Many recent adjudications from the federal bench give the strong sense that the

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[87] *Detroit Free Press*, 303 F.3d at 692.
[88] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
[89] *Detroit Free Press*, 303 F.3d at 700-05.
[90] *Id.*
[91] *Id.* at 704.
[92] *Id.* at 705.
[93] New York Times Co. v. Sullivan, 376 U.S. 254, 305 (1964).

"plenary power" doctrine (at least as applied in the interests of keeping secret immigration matters potentially involving terrorist suspects) is alive and well. In *Global Relief Fund v. O'Neil*, for instance, the Seventh Circuit upheld the constitutionality of § 1702(c) of the USA PATRIOT Act which authorized the use, on an *ex parte* basis, of certain classified information in proceedings involving the "freezing" of terrorist organizations' assets.[94] And in *North Jersey Media Group v. Ashcroft*, the Third Circuit held that closure of "special interest" removal hearings involving respondents having alleged terrorist associations did not offend First Amendment principles.[95]

North Jersey Media Group, in fact, reaches an opposite conclusion to that arrived at in *Detroit Free Press*. The case of *North Jersey Media Group* involved the same government memorandum (issued by Chief immigration judge, Michael Creppy) which essentially closed to the public certain types of removal proceedings — namely those in which the respondent might have knowledge of the September 11 attacks. As in the *Detroit Free Press* decision, the Third Circuit in *North Jersey Media Group* was asked to determine whether the two part "experience and logic" test of *Richmond Newspapers* extended to administrative removal proceedings.[96] Extrapolating from historical experience, the Third Circuit found that "government proceedings," which historical practice showed to be often closed, were to be distinguished from criminal proceedings conducted by courts, which the Supreme Court had held to be absolutely open to the media.[97] The Third Circuit thus rejected the analogy between common law criminal trials and administrative removal proceedings, which had been upheld by the Sixth Circuit in *Detroit Free Press*. Finally, the Third Circuit found that, although modern removal proceedings were the heir to old deportation proceedings, which had often been customarily open to the public, such proceedings were not invariably open.[98] There were many instances in which they were closed.[99]

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[94] Global Relief Fund v. O'Neil, 315 F.3d 748 (7th Cir. 2002).

[95] N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

[96] *N. Jersey Media Group*, 308 F.3d at 200.

[97] *Id.* at 208.

[98] *Id.* at 204-16.

[99] *Id.*

Determining that there was no mandatory right of access, the court ruled that such access could exist only through "executive grace."[100] In this respect, the Third Circuit concluded that the interests protected by secrecy outweighed those which would be advanced by an open proceeding.[101] A highly articulate dissent remarked on the growth of the administrative State and the dire consequences of allowing agencies to affect vital interests in an environment governed by secrecy.[102]

Most recently, in *Center for National Security Studies v. U.S. Department of Justice*, the District of Columbia Circuit ruled against disclosure under the Freedom of Information Act ("FOIA") of the names of those persons detained during an in vestigation of the September 11 attacks.[103] A FOIA request had sought a list of such detainees, including those held for immigration violations; those held as material witnesses; and the lawyers representing the foregoing.[104] The District Court for the District of Columbia had ordered disclosure of the names of the detainees plus their attorneys but agreed to the withholding of all other detention information.[105] Noting that FOIA authorized the withholding of information which would hamper "enforcement proceedings," the appeals court reversed this judgment and ordered that the names of all detained and their legal representatives be withheld.[106] In rendering this judgment, the court virtually placed its imprimatur on a variant of the "plenary power" doctrine, ruling that it was not an abdication of the judicial function to refrain from "second guessing" the Executive Branch in its determination of which disclosures would, and which would not, have unfavorable implications for national security.[107] On the First Amendment issue, the court distinguished *Detroit Free Press*, indicating that it was dealing not with "access to information relating to a government adjudicative process," but rather to "investigatory information."[108]

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[100] *Id.* at 215.

[101] *Id.* at 216-20.

[102] *Id.* at 221-29.

[103] Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003).

[104] *Id.* at 922.

[105] *Id.* at 920.

[106] *Id.* at 925-32.

[107] *Id.* at 927-32.

[108] *Id.* at 936.

The trend of these cases seems relatively clear. Great deference is being given to the Executive Department in connection with steps taken by executive agencies in seeking to protect national security. Where that deference will receive a check has become a matter of pressing concern for those who view such lack of judicial control as having grave public policy implications. *Detroit Free Press*, however, at least suggests a salutary "bright-line" to the effect that, where enforcement is achieved through access to an adjudicative process, the normal First Amendment issue will be resolved in favor of disclosure of and access to the relevant information. Modern removal proceedings, although they have been held to be civil rather than criminal in nature, clearly entail consequences which often make criminal sanctions pale. It is for this reason that deportation statutes are to be strictly construed since they often involve the draconian results such as banishment or exile.[109] The chief exception to this emerging doctrine seems to be in the area of "enemy combatants," which is discussed below.

V. Due Process Concerns: The Issues of Secret Evidence and the Monitoring of Attorney/Client Conversations

Section 235(b) of the Immigration and Nationality Act ("INA") permits the use of secret evidence in the case of removing "arriving" non-citizens.[110] INA § 240(b)(4)(B) further permits the use of secret evidence both in connection with opposing an alien's admission to the United States, and to defeat an application for lasting immigration relief (e.g., political asylum). Prior to September 11, courts had struck down the use of "secret evidence" in cases where the removal of alleged terrorists was at issue.[111]

This trend continues despite the events of September 11 and the new judicial conservatism which those events helped to create. In *Singh v. INS*, an immigration judge had denied a foreign national's application for asylum on the basis of "factual

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[109] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

[110] INA § 235(b).

[111] *See, e.g.*, Steven H. Legomsky, Immigration and Refugee Law and Policy 126 (Pocket Part, 3d ed. 2002), and authorities cited therein.

inferences from classified evidence."[112] The Board of Immigration Appeals ("BIA") affirmed this ruling.[113] On appeal, the Ninth Circuit ordered the INS to produce all classified materials presented to the Immigration Judge.[114] The court reasoned that it could not perform its statutory function of review unless these materials were made available.[115] Due process thus required *in camera* inspection as an aspect of judicial review.

Another rather alarming development allowed the Attorney-General to monitor attorney-client conversations, when the head of a qualifying agency has "reasonable suspicion" to believe that the communications are being used to further terrorist acts. Specifically, the relevant Order provides:

> In any case where the Attorney-General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director . . . shall . . . provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to person, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.[116]

The regulation contains some review procedures that ameliorate its otherwise chilling thrust. Among these are the existence of a "privilege team," which is to remain separate from the investigation, and which would "minimize" the intrusion into privileged material.[117] Notwithstanding this feature and the requirement that there be advance notice to the inmate and the attorney, the American Bar Association ("ABA") substantively criticized the regulatory regime as a derogation of existing standards.[118] The ABA noted that a court order could always be obtained to monitor such conversations upon a showing of

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[112] Singh v. I.N.S., 328 F.3d 1205, 1206 (9th Cir. 2003).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] 66 Fed. Reg. 55,062, 55,066 (Oct. 31, 2001), *amending* 28 C.F.R. § 501.3(d).
[117] *Id.*
[118] *Id.* at 55,066.

probable cause, since embarking upon a criminal venture is not a proper aspect of the attorney-client relationship.[119] The new approach significantly modifies that salutary standard by substituting "reasonable suspicion" for "probable cause."[120]

VI. Use of Military Commissions

Perhaps nowhere is the clash between domestic and international human rights law and the rights of aliens been brought more forcefully into play than in President Bush's Military Order proposing the use of "military commissions" to try aliens suspected of involvement in terrorist acts.[121] The deployment of these commissions would effectively remove the trial of suspects from the constitutional protections of U.S. courts. The "commissions" base their authority to try such cases on the executive power of the president as commander in chief.[122]

The case law interpreting the scope of the President's power to establish such commissions has been, from the point of view of the detainees, not promising. *Al Odah v. United States*[123] involved essentially two actions in which the petitioners, non-citizens detained at Guantanamo Bay, Cuba, challenged the conditions of their confinement. The petitioners sought, in one case, more humanitarian treatment including access to their families and, in the other, actual release from confinement.[124] The District Court for the District of Columbia treated both cases as involving petitions for writ of habeas corpus. The court ruled that it lacked jurisdiction to hear the cases, because the petitioners were non-citizens seeking relief from outside the jurisdictional confines of the United States.[125] The Court of Appeals for the District of Columbia affirmed this

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119 *Id.*

120 *See generally* LEGOMSKY, *supra* note 111, at 104.

121 *See* Military Order regarding "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 13, 2001). The Order relates to non-citizens whom the President has reason to believe are: (a) present or former members of al Qaeda; (b) involved in activities with adverse effects on the United States, its citizens, its national security, economy, or foreign policy; or (c) persons who may have harbored any of the foregoing individuals. *Id.* § 2(a)(1)(i-iii).

122 *Id.*

123 Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

124 *Id.* at 1136.

125 *Id.*

ruling with minor modification.[126] Relying on the authority of *Johnson v. Eisentrager*,[127] the court found that Fifth Amendment rights do not extend to aliens who are outside the sovereign territory of the United States.[128]

In *Hamdi v. Rumsfeld*,[129] the Fourth Circuit upheld the right of a United States citizen to petition for a writ of habeas corpus with respect to his detention in the United States as an "enemy combatant," but determined that the scope of judicial review was limited.[130] Among other things, the *Hamdi* court ruled that a government affidavit certifying that the petitioner had been captured in a combat zone during the recent Afghan conflict was sufficient to establish his status as an "enemy combatant."[131] Having found that the petitioner was not entitled to challenge the underlying facts of the government affidavit, the Fourth Circuit concluded that Hamdi's detention was proper.[132] The court relied, in this respect, on an oft-cited case, *Ex Parte Quirin*[133] to the effect that,

> [o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches.[134]

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126 *Id.* at 1134.

127 Johnson v. Eisentrager, 339 U.S. 763 (1950) ("We are cited to no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes").

128 *Id.* at 1137. The Supreme Court has now granted certiorari in connection with the *Al Odah* case limited to the following question: "Whether United States courts lack jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Naval Base, Cuba." Al Odah v. United States, 124 S. Ct. 534 (2003) (mem.). *See also* Linda Greenhouse, *Justices to Hear Case of Detainees at Guantanamo*, N.Y. TIMES, Nov. 11, 2003, at A1.

129 Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

130 *Id.* at 450.

131 *Id.* at 461.

132 *Id.* at 476.

133 Ex Parte Quirin, 317 U.S. 1 (1942).

134 *Hamdi*, 316 F.3d at 475.

In a significant aspect of its ruling, the circuit court held that petitioner could draw no comfort from the fact that Article 5 of Geneva Convention III, relative to prisoners of war, requires that there be a determination of "enemy combatant" status before confinement becomes appropriate.[135] Petitioner stressed the difference between "lawful" and "unlawful" combatants central to the Geneva Conventions as a whole.[136] In response to this argument, the circuit court determined that both classes are subject to confinement during the pendency of hostilities.[137]

Ominously, however, the appeals court also found that the Geneva Conventions are not self-executing.[138] This legal conclusion raises grave implications for the future of those facing trial under President Bush's Military Order.[139] For it is not only article 5 which is cast in doubt by the court's ruling but the entire body of the Conventions, including those provisions which establish standards of humane treatment for prisoners of war, and which set forth civilized rules of procedure governing the trial of those detained during armed conflict. The non-self executing nature of the Conventions remarked upon by the court, moreover, is completely at odds with the modern doctrine that certain fundamental norms codified in the Geneva Conventions (including those relating to "due process") are rules of customary law and, in effect, *jus cogens*. This means that no derogation from these provisions is permissible, so long as the international community of States as a whole does not develop a new rule. Therefore, the norms of the Geneva Conventions do not require implementation through statutory enactment, but acquire binding effect through their status as customary law.[140]

The use of "military commissions" for the purposes of trying those believed to be responsible for acts of terrorism against the

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[135] *Id.* at 468 (citing Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135).

[136] *Id.* at 469.

[137] *Id.*

[138] *Id.* at 468.

[139] It should be noted that Hamdi was not being detained under President Bush's Order, but pursuant to the President's war powers as detailed in Article II, Section 2 of the U.S. Constitution. *Id.* at 470-72.

[140] *See, e.g.*, THEODOR. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 74 (1989).

United States and its citizens raises grave questions under both domestic and international law. The Bar Association of the City of New York has now issued a very lucid and forceful report which explores some of these questions.[141] Among other things, the Report concludes that the *Quirin* case does not provide legal authority for the trial of "harboring" suspects in military commissions.[142] Moreover, the indefinite detention of aliens, which the Military Order seems to permit, is clearly unconstitutional, at least as applied to those aliens held in the jurisdiction of the United States. This is particularly the case since Congress has deemed it appropriate to legislate in this area. Through the USA PATRIOT Act, Congress has amended INA § 236 to provide that those who are detained as terrorist suspects must be criminally charged or placed in removal proceedings within seven days following the commencement of detention, unless the President certifies that release would endanger the national security of the United States.[143] Accordingly, this is an area where the President is on extremely weak constitutional ground concerning his independent powers, since he is acting in an area in which Congress has already expressed certain preferred policies.[144]

The executive branch is unquestionably subject to certain procedural rules pursuant both to treaty law and to legislative enactment which the presidential order, standing alone, is not effective to modify.[145] Relevant statutory provisions can be found in the Uniform Code of Military Justice,[146] while U.S. international obligations are largely codified in the Geneva Con-

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141 Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, *Inter Arma Silent Leges: In Times of Armed Conflict Should the Laws be Silent? A Report on the President's Military Order of November 13, 2001 Regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,"* 57 THE RECORD 39 (2002) [hereinafter Committee Report] (arguing that precedent supports use of military commissions within "prototypical declared war between nations involving members of the armed forces of an enemy state" but urging "the greatest caution in extending the laws of war to situations not traditionally contemplated").

142 *Id.* at 54, 60-61.

143 *Id.* at 60-62 (*discussing* § 412 of the USA Patriot Act).

144 *Id.* at 62-63 (*discussing* Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (The Steel Seizure Case)).

145 *Id.*

146 10 U.S.C.A. § 821 (1956).

ventions of August 12, 1949.[147] A preferred forum would therefore be one in which the procedural requirements of U.S. constitutional law, U.S. statutory law, and international humanitarian law would be observed.[148] Such a preferred tribunal would be:

- An international tribunal such as the one established by the Rome Statute of the International Criminal Court;
- A federal district court; or
- A court martial empanelled under the Uniform Code of Military Justice.[149]

Many individuals who are exposed to criminal charges undoubtedly were taken in the field during an open military engagement. Where it appears that such individuals have done nothing more than to engage in the lawful exercise of military force (i.e., they have only participated in using force against lawful military objects, and not against civilians), they should

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[147] The Geneva Conventions of 1949 are (1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *in force* Oct. 21, 1950, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; (2) Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of Armed Forces at Sea, *in force* Oct. 21, 1950, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; (3) Convention Relative to the Treatment of Prisoners of War, *in force* Oct. 21, 1950, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; and (4) Convention Relative to the Protection of Civilian Persons in Time of War, *in force* Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. *See also* Protocol Additional I to the Geneva Conventions of 1949 (relating to protection of victims of international armed conflict), *in force* Dec. 7, 1978, U.N. Doc. A/32/144/Annex I (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional II to the Geneva Conventions of 1949 (relating to the protection of victims of non-international armed conflict), *in force* Dec. 7, 1978, U.N. Doc. A/32/144/Annex II (1977), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

[148] Many commentators rely on the *Quirin* case, 317 U.S. 1 (1942), which upheld the use of military commissions to try certain Nazi *saboteurs* who landed in the U.S. and then proceeded inland in civilian clothing in violation of the laws of war. This case arguably has been superseded by two developments: by the passage of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000) and by the United States becoming a party to the Geneva Conventions of August 12, 1949 and of Protocol I, *supra* note 147 (both dealing with the laws of war applicable to international armed conflict). Executive action standing alone would not be sufficient to support the constitutionality of military commissions which are not subject to the kinds of procedural safeguards which Congress has specifically endorsed. Moreover, as a matter of public policy, the executive branch should refrain from adopting procedures which are hostile to customary norms which are codified in a treaty to which the United States is a party.

[149] *See* Committee Report, *supra* note 141, at 74-78.

be entitled to the full benefits of "prisoner of war" status.[150] This would include the right to be returned to their home states after hostilities have come to an end[151] and the right not to have certain types of information extracted from them.[152] The war in Afghanistan constitutes a colorable international armed conflict within the meaning of the Geneva Conventions and Protocol I thereto.[153] The administration repeatedly raises doubts regarding the status of the belligerents, maintaining the view that members of al Qaeda are "unlawful combatants."[154] It should be noted, however, that the scope of Convention III (relating to Prisoners of War) remains comparatively liberal. The essential requirements of Convention III are that the "combatant" must act under an organized command; carry his or her arms openly; have a distinctive sign recognized at a distance; and conduct military operations in conformity with the requirements of the laws of war.[155]

Importantly, the commentary to the Conventions indicates that parties to the Conventions (including the United States)

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[150] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(B)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. Importantly, the President has concluded that, whereas the situation of the Taliban combatants may be considered as governed by Geneva Convention III, members of al Qaeda are not so covered. *See generally* Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 325 (2002). Irrespective of whether or not this view is correct, it remains clear that this determination should be made by a "competent tribunal" under article 5 of Geneva Convention III, and not by the President of the United States.

[151] Geneva Convention III, *supra* note 150, art. 118.

[152] *Id.* art. 17.

[153] *See* Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127, 143 (2003). Even though neither the United States nor Afghanistan have ratified Protocol I, they would be bound by the fundamental principles of that Protocol as reflective of general international customary law. *See generally* Vincent Chetail, *The Fundamental Principles of Humanitarian Law Through the Case Law of the International Court of Justice*, 21(3) REFUGEE SURVEY QUARTERLY 199 (2002). Afghanistan and the United States, moreover, remain parties to the Geneva Conventions. *See, e.g.*, Knut Dörmann, *The legal Situation of "Unlawful / Unprivileged Combatants,"* 849 INTERNATIONAL REVIEW OF THE RED CROSS 45 (Mar. 2003) *at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_review_2003_849?OpenDocument (author focuses on the controversially debated question of whether "unlawful combatants" fall into the personal scope of application of the Fourth Geneva Convention of 1949).

[154] *See generally* Mundis, *supra* note 150, at 320.

[155] *See, e.g.*, Geneva Convention III, *supra* note 150, arts. 4(2)(a)-(d).

should comply with its terms, even though there may be doubts as to the status of the other party to the conflict.[156] The procedural rules of the Conventions mirror those in U.S. domestic law regarding the rights of criminal defendants.[157] It should be mentioned that, even if an individual is shown not to have engaged in lawful military force but to have committed what the Conventions call a "grave breach" (i.e., conspired to engage in a "crime against humanity" or an act of genocide, or the unlawful slaying of a civilian), this would not cause a "jurisdictional lapse."[158] Such an individual could still be tried for the offense by a court of competent jurisdiction established under the Geneva Conventions.[159] Such offenses would unquestionably embrace engaging in a conspiracy to commit the September 11 atrocities.

The United States is bound by the Geneva Conventions with regard to those who are taken into custody during an international war.[160] The holding of the *Hamdi* case that the Geneva Conventions are not self-executing is not persuasive, particularly in light of the fact that the Conventions represent customary law (and in may instances *jus cogens*), and that such

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[156] *Id.* arts. 99–108.

[157] *Id.* Application of these rules would virtually mandate that those detained pursuant to the Military Order be tried by court-martial "employing the applicable procedural and evidentiary rules." Mundis, *supra* note 150, at 327. As one article on the subject has noted:

> First, Court Martial Rule 1004 sets forth the prerequisites for the death penalty to be adjudged. This rule requires, inter alia, the concurrence of all members of the court martial present at the time of the voting. Second, RCM 921(c)(2)(B) sets forth the applicable rules with respect to voting on guilt or innocence and provides that at *least* two thirds of the court-martial present must vote to convict in order to make the verdict lawful. Moreover, if the sentence imposed exceeds ten years' imprisonment, three-fourths of the court-martial members present must vote for that sentence. Third, members of the U.S. armed forces are guaranteed the right of appeal right up to and including review by the U.S. Supreme Court. Fourth, trial by court-martial is generally an open proceeding, subject to very limited exceptions. Fifth, the accused before a court-martial have the right to select civilian defense counsel of their choice.

Id. (emphasis in original).

[158] *Id.* at 322-28.

[159] *Id.* Even if convicted, POW's continue to benefit from the protections of the Conventions. Geneva Convention III, *supra* note 150, art. 85. *But see* Johnson v. Eisentrager, 339 U.S. 763 (1950) (stating that the power of the military to exercise jurisdiction over members of armed forces is well established). *Id.* at 786.

[160] *See* Mundis, *supra* note 150, at 325.

customary norms do not require implementation to have primacy and direct effect.[161] One of the most essential principles of international humanitarian law, moreover, is that signatory States should both respect and assure respect for the Conventions in all circumstances.[162] This principle was held to be a *jus cogens* norm by the International Court of Justice in the *Nicaragua Judgment*,[163] and is thus universal and non-derogable. The government's attempt to evade "Prisoner of War" status for those taken on the field in open international conflict is an obvious lack of conformity to the requirements of the Geneva Conventions.

VII. Criminal Aliens and the Problem of Ex Post Facto Laws

Prior to the 1996 legislation, lawful permanent residents had access to a broad discretionary waiver per § 212(c) of the statute.[164] If granted, the waiver was effective to relieve the alien of the consequences of certain grave acts which would otherwise give rise to inadmissibility under the statute, including some serious criminal convictions.[165] In a series of statutes, beginning with the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")[166] and later with the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[167] Congress acted first to delimit § 212(c) relief and ultimately to replace it with a new, much more restricted remedy called Cancellation of Removal, Part A.[168] Among other things, Cancellation of Removal, Part A would not waive crimes classified as "aggravated felonies," such as narcotic distribution convictions and alien smuggling.[169]

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[161] *See* Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings Int'l & Comp. L. Rev. 411 (1989).

[162] Geneva Convention III, *supra* note 150, art. 1.

[163] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) [hereinafter *Nicaragua Judgment*].

[164] I.N.S. v. St. Cyr, 533 U.S. 289 (2001).

[165] *Id.* at 295.

[166] *Id.* at 289.

[167] *Id.* at 289.

[168] INA § 240A(a), 8 U.S.C. § 1229b(a) (2000).

[169] INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2000).

What would happen to those aliens who had either been placed in proceedings before the legislation, or who had filed claims prior to its effective date? The government answered that question in an administrative decision called *Matter of Soriano*, in which it determined that such residents were not eligible to apply for § 212(c) relief since the legislation had retrospective effect.[170] The government's determination was almost uniformly rejected in the federal appellate courts, including the Second Circuit.[171] Ensuing regulations sought to codify the jurisprudence emerging in the circuit court opinions.[172]

The remaining issue was the availability of relief for aliens facing removal proceedings under the new statute (IIRIRA) with criminal convictions predating passage of the legislation. Could an individual in removal proceedings who would other-

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[170] In re Soriano, 21 I. & N. Dec. 516 (BIA 1996), the Board of Immigration Appeals (BIA) ruled that AEDPA's bar on discretionary relief should not apply retroactively to those who had petitioned for such relief before AEDPA's effective date. 21 I. & N. Dec. at 519-20. The Attorney General reversed the BIA and issued an opinion concluding that AEDPA should be applied retroactively to all pending cases. 21 I. & N. Dec. 533 (Op. Att'y Gen. Feb. 21, 1997). This interpretation was ultimately rejected by the Supreme Court in I.N.S. v. St. Cyr, 533 U.S. 289, 323-26 (2001).

[171] For a history, *see* LEGOMSKY, *supra* note 111, at 577. A decision which is worthy of note is Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997), *affirmed sub nom.* Henderson v. I.N.S., 157 F.3d 106 (2d Cir. 1998), in which the Hon. James Weinstein wrote a pioneering opinion in this area. Among other things, the court found that Congress had not been clear as to whether the new law (AEDPA) was to have retrospective effect. Judge Weinstein ruled that AEDPA was not to be given retrospective reach in this instance. The court adopted as the basis for its decision the standard rule that, wherever possible, U.S. statutory law should be construed harmoniously with general international law, which forms a part of the common law. The court then set out in an elaborate section of the opinion an analysis of the case law arising under articles 8 and 11 of the European Convention of Human Rights which had been construed by the European Court of Human Rights to preclude the *refoulement* (return) of aliens without a hearing as to the impact which such removal would have on family members of the alien who were nationals of the home State. Judge Weinstein noted that such removal, under the Strasbourg jurisprudence, would not be ordered unless proportional to the State's interest in maintaining its own security: specifically, the hardship to the family members would have to be found not to outweigh legitimate national security concerns for removal to be appropriate. Judge Weinstein found that the Strasbourg jurisprudence was representative of the state of customary international law, and that U.S. law would not be in conformity with general international standards if given retrospective effect.

[172] 66 Fed. Reg. 6,436, 6,446 (Jan. 22, 2001).

wise have to seek the more restrictive relief (Cancellation of Removal) under IIRIRA apply for a waiver under § 212(c)? The Supreme Court has ruled that such an individual might apply, provided that the conviction was the result of a plea bargain and the alien would have been eligible for § 212(c) relief at the time the conviction was entered.[173]

Issues relating to the fairness of applying the "aggravated felony" bar retrospectively have clearly stirred the same kinds of judicial concerns as have arisen over mandatory and indefinite detention. The decision *Beharry v. Reno*,[174] handed down in New York by a federal judge who was instrumental in crafting § 212 relief prior to either AEDPA or IIRIRA, illustrates forcefully the continuing containment of the "plenary power" at the hands of the federal courts. Although the decision was recently reversed by the Second Circuit Court of Appeals, the appeals court based its ruling only on the petitioner's failure to exhaust administrative remedies, thus leaving unaffected much of the District Court's rationale for its ruling.[175]

Beharry was a long-term resident of the United States who had entered the country at the age of seven in 1982.[176] In November 1996, Beharry was convicted of robbery.[177] Although that crime was an "aggravated felony" at the time of conviction , it would not have been one at the time the crime was committed.[178] The alien also found himself barred from a generic waiver provided by the statute (§ 212(h)), in that Congress deliberately exempted lawful permanent residents from that waiver (in an effort to penalize them) if they had been convicted of an "aggravated felony."[179]

In *Beharry*, the court, through Judge Weinstein, found that lawful permanent residents would not be precluded from applying for the broader waiver contained in § 212(h), because the act

[173] I.N.S. v. St. Cyr, 533 U.S. 289, 290 (2001).

[174] Beharry v. Reno, 183 F. Supp. 2d 584, 592 (E.D.N.Y. 2002).

[175] Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

[176] *Beharry*, 183 F. Supp. 2d at 586.

[177] *Id.*

[178] *Id.* at 588. The reason is that under the Cancellation of Removal Act, a sentence of imprisonment of more than one year is an "aggravated felony," but § 212(c) required a sentence of more than five years imprisonment for an offense to be characterized as an "aggravated felony."

[179] *Id.* at 592.

giving rise to the conviction took place prior to the effective date of IIRIRA.[180] What is important is not the substantive result reached by Judge Weinstein, but rather the methodology by which he reached it.

Judge Weinstein found that denying lawful permanent residents the opportunity to show the severe hardship on family members by virtue of the alien's removal was contrary to basic tenets of both customary international law and of treaty law.[181] The District Court determined that the Convention on the Rights of the Child,[182] although not ratified by the United States, represented customary law and that, in the absence of an express contrary provision in U.S. statutory law, the customary rule should govern.[183]

The District Court also found that barring lawful residents with aggravated felony convictions from making INA § 212(h) applications ran counter to U.S. obligations under the International Covenant on Civil and Political Rights ("ICCPR").[184] That instrument "prevents a nation from separating families in a manner that, in accordance with its domestic law, is nonetheless unreasonable and in conflict with underlying provisions of the ICCPR."[185] The court noted that the ICCPR had been characterized by the U.S. Senate as non-self-executing.[186] Nonetheless, non-self-executing treaties had been used by the courts for a variety of purposes, including establishing the state of customary international law.[187] In this case, there could be no doubt but that the ICCPR's preclusion against returning long-term residents without a hearing concerning the impact on re-

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180 *Id.* at 603.

181 *Id.* at 604.

182 *Id.* at 600, 604. Convention on the Rights of the Child, *adopted* 20 Nov. 1989, *entered into force* 2 Sept. 1990, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (1989) [hereinafter Convention on the Rights of the Child].

183 *Beharry*, 183 F. Supp. 2d at 600, 604.

184 *Id.* at 604. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, *entered into force* 23 Mar. 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *reprinted in* 6 ILM 368 (1967) [hereinafter ICCPR] (establishing the right of all persons to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of criminal charges or of rights and obligations in any suit at law).

185 *Beharry*, 183 F. Supp. 2d at 595, 603.

186 *Id.* at 603.

187 *Id.* at 604.

maining family members violated essential provisions of customary law.[188]

In short, the District Court adopted general international law, not to abrogate an existing U.S. statute, but to clarify it. It is the responsibility of U.S. tribunals to read a statute, wherever possible, so as to render it consistent with U.S. international obligations.[189] Judge Weinstein's decision does this admirably.

The policy underpinnings for such an approach are also spelled out with precision by the court. As has often been said, the United States cannot expect to reap the benefits of internationally recognized human rights without itself being willing to

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[188] *Id.* at 603-04. In an earlier decision Mojica v. Reno, 970 F. Supp 130 (E.D.N.Y. 1997), the same judge had found that giving retrospective reading to AEDPA violated the customary norm that family members of the alien be provided an opportunity to give evidence concerning the hardship which the alien's removal would entail as to them. The opinion noted that, under customary law, such hardship should be balanced with the security needs of the home state. *Id.* at 152. A leading case on this question is Berrehab v. Netherlands (A/138): (1989) 11 E.H.R.R. 322, where the European Court of Justice held:

> As to the aim pursued, it must be emphasized that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there – he had married a Dutch woman, and a child had been born of the marriage.
>
> As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Beherrab and his daughter for several years and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interference in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.
>
> *Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8.*

Id. para. 29 (emphasis added). This decision is abstracted in GILLES DUTERTRE & JAKOB VAN DER VELDE, KEY EXTRACTS FROM A SELECTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND DECISIONS AND REPORTS OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS 110-11 (1999).

[189] Murray v. Charming Besty, 6 U.S. 64, 118 (1804) (holding that a statute must, whenever possible, be interpreted so as to avoid conflict with the "law of nations").

comply with them.[190] Courts should avoid a construction of existing statutes which would place the nation in violation of international law, since such rulings would embarrass the executive in its conduct of foreign affairs.[191] The court concluded by noting that the foundation of the immigration power was international law.[192] This made application of international human rights doctrine especially appropriate with regard to interpreting immigration statutes.[193]

The government's apparent unwillingness to conform to its international obligations is a further indication of its proclivity to resolve questions relating to immigration and to aliens in a manner that is outside the scope of international and domestic legal protections. As Judge Weinstein noted, such an approach in inconsistent with a rational world order and with the universe of human rights from which the United States, like other sovereigns, would hope to benefit.

VIII. ASYLUM SEEKERS

Expedited removal was introduced into our law in the 1996 legislation.[194] In broad outline, those who arrive with false documents or no documents are to be summarily removed without a hearing. If the alien makes any one of three representations (that she wishes to apply for asylum, that she fears persecution, or that she has "concerns" about return), she is to be placed in a "credible fear" interview.[195] In that interview, she must show a "significant possibility" that she could make out a developed asylum claim, or she will be returned forthwith to the country of embarkation.[196] During the pendency of that interview, the asylum seeker is to be detained.[197] The statute says nothing about detention after the asylum seeker shows credible fear, but most

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[190] *Beharry*, 183 F. Supp. 2d at 601.

[191] *Id.*

[192] *Id.* at 598.

[193] *Id.* at 601-02.

[194] *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 100 Stat. 3009 (1996) [hereinafter IIRIRA].

[195] INA § 235(b)(1)(A).

[196] INA § 235(b)(1)(B)(ii)-(iii).

[197] *Id.*

INS District Directors have historically exercised their discretion to keep the alien in detention.[198]

Significant human rights issues are generated by virtue of this statutory scheme. In the first place, it is contrary to international customary law to return without a hearing any alien to the frontiers of a State where she will be persecuted, or to a State which itself does not respect the right of non-return.[199] Such return is branded as "rejection at the frontier."[200] Threshold questions exist with respect to what happens at the "secondary inspection," where the alien engages in her first meaningful interview with the Department of Homeland Security ("DHS") and must make one of the three representations set out above. There is no record with respect to this interview, and efforts by the *pro bono publico* bar to gain access to the "secondary inspection" have not yet met with broad success.[201]

To what degree is there effective communication between DHS front-line officers and otherwise qualifying asylum seekers, due to the absence of translators or other causes? To what extent are those with a fear of persecution being returned at this stage without any kind of meaningful interview in contravention of customary international law? At this point, we simply do not know. It is certain, however, that the environment of comparative secrecy already surrounding "secondary inspection" is not likely to be relieved by the events of September 11.

A second level of concern relates to the continuing detention of asylum seekers after they have met the "significant possibility" standard. "Expedited removal" was an effort by the United States to codify, to some degree, international customary law relating to the filing of "frivolous" asylum claims.[202]

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[198] Nicholas J. Rizza, *INS Detention: The Impact on Asylum Seekers*, *available at* http:/www.refugees.org/world/articles/ins_detention_n96_htm. There is no indication that this practice will change under the aegis of the Department of Homeland Security.

[199] Note on Non-Refoulement (Submitted by the High Commissioner), EC/SCP/2 (Aug. 23, 1977), United Nations Refugee Agency, *at* http://www.unhcr.ch/cgi-bin/texis/vtx/home.

[200] *Id.*

[201] *See* Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 134, 140 (2001).

[202] *See* Donald Kerwin, *Looking for Asylum, Suffering in Detention*, 28-WTR HUM. RTS. 3, *3 (2001).

States are permitted to return aliens summarily where they put forward asylum claims which are "manifestly unfounded or abusive."[203] Where an alien meets the "credible fear" standard, however, such concerns should no longer gain currency. Detention which goes beyond the State's concerns in guarding itself against spurious applications can no longer be defended as supported by a valid public interest; the State's justification in continuing detention evaporates.

Despite the elimination of the need to detain, asylum seekers meeting the credible fear standard continue to be confined while their asylum applications are heard. The District Director's inclination to exercise discretion in granting parole in such circumstances will certainly be inhibited by the September 11 events. Thus, even those asylum seekers who have a colorable claim to international human rights protection will remain in what is essentially a punitive system of detention.

The United Nations High Commissioner for Refugees ("UNHCR") has recognized the need for detention to meet some standard of State necessity.[204] Detention which does not meet this test will be viewed as a penalty in violation of the 1951 Convention on the Status of Refugees.[205] According to UNHCR, detention becomes justified in only four situations:

- verification of identity;
- determination of the elements upon which the claim to refugee status is based;
- cases in which refugees or asylum seekers have destroyed travel or identity documents in order to mislead the authorities; or
- protection of national security or public order.[206]

Detaining the individual beyond the point at which these criteria are satisfied, it is submitted, constitutes a "penalty" within the meaning of Article 31 of the Refugee Convention, and thus contravenes international customary law.

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[203] *See* Ramji, *supra* note 201, at 125.

[204] This UN agency is responsible for international refugee resettlement and for promulgating guidelines on the normative standards of refugee law. *See* UNHCR *Guidelines on Detention of Asylum Seekers, United Nations High Commissioner for Refugees, at* http://www.rcmvs.org/investigacion/Asylum.htm (last visited May 6, 2004) [hereinafter UNHCR Guidelines].

[205] *Id.*

[206] UNHCR Guidelines, *supra* note 204, Guideline 3.

Urging these concerns and others, groups such as the Lawyers' Committee for Human Rights have sought to repeal the current statutory scheme relating to expedited removal.[207] The events of September 11, however, have imposed a temporary halt to such efforts and the current system is likely to be with us for some time. That is regrettable in light of the grave human rights implications it raises.

It must also be noted that judicial control of the expedited removal process has been totally ineffectual. This is largely because Congress provided for a "one-time systemic challenge" to expedited removal, a challenge which failed in *American Immigration Lawyers Ass'n v. Reno.*[208] The failure of the case can generally be attributed to the court's unwillingness to entertain arguments that the statutory scheme offended general international law.[209]

Moreover, recent administrative jurisprudence suggests that the situation is deteriorating rather than improving. A recent decision by the Attorney General ("AG") reveals that the DHS's detention policy relative to asylum seekers is expanding beyond the area of "expedited removal." In *Matter of D-J-*, the AG overturned as unwarranted the release on bond of a Haitian asylum seeker who had attempted to reach U.S. shores by boat and who had been apprehended onshore.[210] Importantly, both the immigration judge and the Board of Immigration Appeals had found that the respondent did not pose a flight risk or a threat to the community.[211] Despite these findings, and without really overturning them, the AG determined that bond was not appropriate in these circumstances.[212]

The opinion noted that there was no constitutional right to an individualized bond hearing for inadmissible non-citizens.[213] The AG then went on to rule that the public policy considerations raised by the INS on appeal merited overturning the asy-

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[207] *See,* Slamming "The Golden Door": A Year of Expedited Removal, Humans Rights First, *at* http://www.humanrightsfirst.org/pubs/descriptions/golden.htm (last visited Mar. 27, 2004).

[208] Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38 (D.D.C. 1998).

[209] *Id.* at 52.

[210] Matter of D-J-, 23 I. & N. Dec. 572 (A.G. 2003).

[211] *Id.* at 581.

[212] *Id.* at 574.

[213] *Id.* at 583.

lum seeker's release on bond.[214] These considerations are worth noting because they were entirely divorced from the individual merits of the bond request. Primarily, the AG ruled that attempted entry without admission would encourage other non-citizens to essay the same type of unlawful landing thereby promoting a "mass influx."[215] He also found that granting release on bond would promote evasion of an orderly inspection and admissions process.[216] The national security implications of this finding were deemed persuasive.[217] Because the public policy foundations of the AG's ruling ignore individualized consideration of the asylum seeker's bond request, potentially large classes of non-citizens will now be added to the growing corpus of detained aliens seeking international human rights protection.

Moreover, it should be noted that the respondent's argument in the *Matter of D-J-* that his detention violated general international law was not addressed. The AG simply ruled that the 1967 Protocol to the 1951 Convention on the Status of Refugees was not self-executing.[218] This is yet another example of international protections being trumped by the perceived overriding concerns of a national system.

IX. Evaluation of the Attorney General's Detention Policy

Immediately after the September 11 attacks, the Federal Bureau of Investigation ("FBI") initiated one of its most ambitious investigations into the causes of the disaster. The inquiry, known formally as the Pentagon/World Towers Bombing Investigation ("PENTTBOM"), called for the detention of both those suspected of involvement with the attacks and those thought to have useful information regarding them.[219] Countless individuals who did not fall into either of the above categories, but who

[214] *Id.* at 579.

[215] *See* Matter of D-J-, *supra* note 210, at 580.

[216] *Id.*

[217] *Id.* at 579-80.

[218] *Id.* at 584 n.8.

[219] *See* Office of the Inspector Gen., U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, ch. 10 (June 2003), *at* http://www.usdoj.gov/oig/special/03-06/ [hereinafter IG Report].

were vulnerable because of "immigration violations," fell subject to the government's dragnet and were detained.[220]

On June 2, 2003, the Inspector General's Office issued a report substantially criticizing the mistreatment of aliens by federal agencies following the September 11 attacks.[221] The report concluded that the FBI failed to distinguish between aliens who were legitimately suspected of terrorism, and those who, at most, would have been culpable of essentially innocuous immigration violations.[222] Many aliens who had been detained did not receive a Notice to Appear (the relevant charging document) within the normally required forty-eight hours, and often had to wait a month to be apprised of the charges against them.[223]

Many of those detained were confined under highly restrictive conditions, usually based on the uninformed opinion of the FBI regarding the non-citizen's connection to terrorism.[224] Such restrictive conditions could consist of a "'lock-down' for at least 23 hours a day; escort procedures that included a 'four-man hold' with handcuffs, leg irons, and heavy chains any time the detainees were moved outside their cells; and a limit of one telephone call per week and one social call per month."[225] As a result of these procedures, many detainees were unable to communicate with counsel and thus gain legal representation.[226] Moreover, the family and friends of the detainees, and even law enforcement officials, often were wholly ignorant as to where the detainees were being held.[227] And, at some detention facilities, the detainees were subjected to harassment, both by correctional officials and by the prison population with whom the they were housed.[228]

Despite the lengthy delays associated with obtaining clearances, the Department of Justice ("DOJ") followed a policy of "no bond" during this time period.[229] Apparently, disputes

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220 *Id.* ch. 4.
221 *See generally id.*
222 *Id.* ch. 10.
223 *Id.* ch. 7, III, C.
224 *Id.*
225 *Id.*
226 *Id.* ch. 7, II.
227 *Id.*
228 *Id.* ch. 7, IV, C–D.
229 *Id.* ch. 5, II.

emerged between the FBI and the INS over the lawfulness of continuing detention after the alien had received a grant of voluntary departure or a final order of removal, where the alien was willing and able to leave the country but had not received a "clearance" from the FBI.[230] It was not until January 2002 that the DOJ accepted that removal was appropriate for these aliens.[231]

These conditions clearly reflect a lack of proportionality between means and ends with regard to the ongoing struggle against terrorism. Asylum seekers searching for surrogate international protection in U.S. courts often face dragnets which ensnare the innocent as well as the guilty. As to those who have no connection with the wrongdoing, this is clearly a form of persecution. Mistreatment which is excessive, and not connected to a criminal prosecution, will give rise to a finding of persecution in the statutory sense.[232]

One may earnestly hope that this situation will improve and that the current conduct of U.S. officials towards non-citizens arising out of the September 11 attacks does not lead to further international criticism of U.S. detention policies. The law of human rights is predicated on a reasonable link between State action and a defined public interest. Where that link cannot be made out, State action will be viewed as an illegitimate infringement of a protected interest.[233] Courts must intervene, where appropriate, to assure that the balance between individual freedom and collective security is respected. However, the

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[230] *Id.* ch. 5, III, D.

[231] *Id.* ch. 6.

[232] In re S-P-, 21 I. & N. Dec. 486, 493 (1996).

[233] For an excellent discussion of this principle in the refugee context, *see* Walter Kalin, *Refugees and Civil Wars: Only a Matter of Interpretation*, 3 INT'L J. REFUGEE L. 435, 450 (1991):

> In determining whether State measures in a civil war situation have a legitimate military character, or whether they constitute political persecution, the German Federal Constitutional Court has followed exactly the same approach as is used by international Courts and similar organs in international human rights and economic law. *Limitations of rights of individuals are only legitimate if they serve a legitimate goal and if, in their actual extent, they do not go further than necessary in order to achieve that goal.* If either they do not in fact serve the invoked interest or are disproportionate, they constitute political, racial or religious persecution if they take place in the context of a political, ethnic or religious conflict. (Emphasis in original).

record so far, with respect to the courts' willingness to do this, is mixed.

X. CONCLUSION AND ASSESSMENT

Many of the problems associated with the plenary power derive from its origins in international law. Indeed, in the *Chinese Exclusion Case*, the Supreme Court laid great stress on the international law foundations of the immigration power, and on the inherent power of States to defend its borders if it were to be a sovereign amongst sovereigns — a State acting within an international community of States.[234]

It was a companion doctrine to this outlook that the immigration power would be comparatively unrestricted. If a sovereign were to be sovereign, it must not be subject to constraint. Any restraints that may exist must flow from ethical concerns and voluntary acts of grace which the sovereign, in its discretion, may exercise from time to time. This was largely the view of Sir John Austin who maintained that there could really be no such thing as international law because all law contemplated the power to enforce a sanction.[235] Since that power was a quintessential attribute of sovereignty, and since no sovereign could itself be subject to sanction without loosing its character as sovereign, "international law" was an oxymoron.[236] What we call "international law" is really a body of ethical rules which the State may or may not accept.[237]

This view is at odds with modern jurisprudence, both at the international and at the municipal level. Among British scholars, it has long been held that the old doctrine of parliamentary omni-competence (under which parliament is absolutely unfettered with regard to its power to legislate) is being gradually modified by the view that ethical concerns are binding on the legislator in his or her adoption of dispositive norms.[238] In international law, the old "dualistic" view that States can displace otherwise valid international obligations by countervailing leg-

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[234] *Chinese Exclusion Case*, 130 U.S. at 604-06; LEGOMSKY, *supra* note 111, at 17.

[235] HANBURY & D.C.M. YARDLEY, ENGLISH COURTS OF LAW 5-9 (5th ed. 1979).

[236] *Id.*

[237] *Id.*

[238] *Id.*

islation is giving way to a "monistic" interpretation of international law under which States cannot set aside otherwise valid international obligations.[239]

Emerging restrictions on sovereignty can also be seen in the modern law of international human rights. As we have seen, such rights have been explicitly relied on by American judges, such as Judge Weinstein, to circumscribe the scope of the "plenary power." States are no longer the sole subject of international law, since individuals and groups are now perceived as enjoying rights directly under regional and universal human rights instruments as well as customary law. Because of the emerging notion of *jus cogens* and of obligations *erga omnes* (universal rights which cannot be derogated from by States and which must be respected by them because of their indispensability to a viable international system), state discretion is being viewed as progressively more confined by the impact it has on individuals and groups.[240]

Sir Henry Maine, in his influential treatise *Ancient Law*, analogized the development of international law to that of municipal law, maintaining that unchecked sovereignty was really the equivalent of early customary codes which were based on the unfettered powers of the *pater familias*.[241] Just as municipal custom based on force had evolved into a complex system of rights and duties based on a reason, so international custom would eventually be assimilated into a fabric of rational norms.[242]

As Robert Jackson maintained in his opening statements at Nuremberg, law is really the tribute which force pays to reason.[243] Recent developments in U.S. immigration law, as the foregoing discussion hopefully shows, illustrate the dialectic between force and reason which is shaping our jurisprudence.

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[239] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32-34 (4th ed. 1990). This view has tended to manifest itself in the case law interpreting the Treaty of Rome. *See, e.g.*, Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1344 (N.D. Ga. 2002).

[240] *Cf.* Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5, 1970).

[241] HENRY MAINE, ANCIENT LAW 10-13 (1982).

[242] *Id.* at 13 *et seq.*

[243] Jackson's opening speech at Nuremberg is summarized in TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 165-73 (1992).

The most formidable checks to the "plenary power" were issued only in 2001 with the advent of the *Zadvydas* and the *St. Cyr* decisions. The natural influence of those cases was abruptly altered by the September 11 events. The dialectic continues, however, and the evolution which was spawned by the Supreme Court in 2001 will, it is to be wished, continue in its course towards a regime of reason.