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Give Me Liberty or Give Me Deportation: The Indefinite Detention of Non-Removable, Criminal Aliens

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NOTE

GIVE ME LIBERTY OR GIVE ME DEPORTATION: THE INDEFINITE DETENTION OF NON-REMOVABLE, CRIMINAL ALIENS

Stacy J. Borisov[*]

I. FOREWORD

David Hudson[**]

The identities of the perpetrators of the horrific atrocities on September 11, 2001, are now known and their immigration status has once again

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* This Article is dedicated to my parents, John and Debra Bevins, who have supported me time and time again, and to my husband, Dimitry, who inspires my interest in immigration law. Special thanks, as well, to David M. Leon, Articles and Comments Editor of the *U. Miami Int'l & Comp. L. Rev.*, who took the time to read and edit an earlier draft of this Article.

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brought discussions about immigration law and policy into our daily lives. It is, perhaps, trite to say that the United States is a "nation of immigrants," but once again we are reminded that many come to our country to do good or to do evil. The debates about how many should be allowed to come here, for what purposes, with what qualifications, and for what length of time will never be resolved with finality; the locations of the lines that are drawn, by Congress and the courts, in answering those questions are constantly shifting.

But what happens to the individual who has been permitted to immigrate, but latter committed a crime and is now no longer entitled to stay? If no other country will consent to taking this person, must the United States be forced to accept them back into our society to mingle at will with our citizens, or may they be kept in prison until another country relents and lets them in? An answer, of sorts, to this dilemma has been provided by the U.S. Supreme Court in its recent decision in *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001).

What follows is a thoughtful exploration of the issues raised above in the context of criminal aliens. In addition to explaining the legal background framing the issues, the author examines the competing public policy concerns involved and arrives at some suggested solutions which balance those concerns. These are critical concerns which affect multiple facets of the immigration law, and thus this Article is indeed timely.

II. ONE MAN'S STORY

In 1979, when Kim Ho Ma was only two years old, his family fled their native Cambodia as refugees.[1] Eventually they gained lawful permanent residence in the United States, where, from the age of eight, Ma grew up.[2] Later as a teenager, Ma got involved with a gang and ultimately participated in a gang-related shooting.[3] He was convicted of first-degree manslaughter and served over two years for the crime.[4] Ma's conviction made him deportable under U.S. immigration laws.[5] Upon being released from prison, the Immigration and Naturalization Service (INS) took him into custody and an immigration judge entered a final order of deportation against him.[6] But the INS could not remove Ma from our country because the United States has no repatriation agreement with Cambodia.[7] As a

1. Ma v. Reno, 208 F.3d 815, 819 (9th Cir. 2000).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

result, Ma was again placed in jail,[8] but this time with little hope of release or even deportation. At the same time, U.S. citizens convicted of similar crimes, who had lived in the United States not much longer than Ma's numerous years as a permanent resident, were given a second chance to live as productive members of society after having served their time for their crimes. Ma, on the other hand, was effectively sentenced to serve time twice, with the second term proving indefinite.[9]

III. INTRODUCTION

For many Americans, the topic of immigration presents a dichotomy of thought and emotion. On the one hand, we are the descendants of immigrants and greatly respect our ancestors for the difficulties they faced in coming to America. But even as Americans recognize and respect the legacy of past immigrants, they worry about the effect of on-going and future immigration. Justifiable public concerns include terrorist activity, increased crime and poverty, a tighter job market with diminished wages, and illegal border crossings.[10]

In 1996, to address the public's immigration concerns, Congress passed sweeping reforms designed to overhaul the grounds for and processes of the exclusion and deportation of aliens.[11] The first relevant legislation was the Antiterrorism and Effective Death Penalty Act (AEDPA), passed in April of 1996.[12] The second, enacted in September of that same year, was the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[13] Together, this legislation will be referred to in this Article as the 1996 Acts. While the 1996 Acts were primarily designed to increase enforcement against illegal immigration, many of the provisions of the 1996 Acts had widespread effects on lawfully admitted aliens, including permanent resident aliens.[14] This Article addresses the disturbing result of the confluence between provisions of the 1996 Acts and the reality of a state-based world: the potential for the indefinite detention of deportable,

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8. *Id.*

9. *See id.*

10. *See generally* STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 218-19 (2d ed. 1997) (discussing reasons for and legislative results of anti-immigrant sentiment in recent years).

11. *E.g.*, Linton Joaquin, *Grounds of Inadmissibility and Deportability and Available Waivers*, *in* UNDERSTANDING THE 1996 IMMIGRATION ACT 1-1 (Juan P. Osuna ed., 1997); Margaret Graham Tebo, *Locked Up Tight*, A.B.A. J. 44, 46 (Nov. 2000).

12. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996).

13. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (1996).

14. *See* JUAN P. OSUNA, UNDERSTANDING THE 1996 IMMIGRATION ACT, Preface (1st ed. 1997).

criminal aliens who cannot be removed from the United States because no other country will open its borders to them.

At the outset, it is important to emphasize that this Article discusses the detention of deportable, rather than inadmissible, aliens. Aliens who arrive at a point of entry but are denied lawful admission into the United States are generally termed "inadmissible." The term "deportable," on the other hand, generally signifies an alien who previously entered the United States lawfully but whose presence is no longer lawful. The focus on deportable aliens within this Article is due to the significant legal distinction between the classifications of "deportable" and "inadmissible" aliens. While both deportable and inadmissible aliens are subject to the same laws that have given rise to indefinite detention by the INS,[15] and while similar practical issues are involved for aliens in either category, the legal issues differ greatly. The courts have historically ruled that the U.S. Constitution affords greater rights to aliens already present in the United States than to those who have only just arrived at the border.[16] Thus, while the law is relatively settled that inadmissible aliens are afforded few, if any, constitutional rights, many issues concerning the scope of the constitutional rights afforded aliens already within our borders still remain unresolved.[17] For that reason, this Article only addresses the indefinite detention of deportable, and not inadmissible, aliens. Furthermore, this Article focuses primarily on one subset of deportable aliens: the criminal alien. The reason for this focus will be made clear upon a closer examination of the immigration laws, as provided in Part IV of this Article.

The changes in immigration law brought on by the 1996 Acts concerning the detention of deportable, criminal aliens, compounded with the "non-removable" nature of some aliens, have resulted in a swell of litigation on this topic in recent years.[18] This Article will introduce the reader to the basic legal issues raised by the indefinite detention of deportable, criminal aliens and elaborate on the numerous underlying public policy concerns that should be brought to bear in any legal analysis of the matter. Part IV of this Article addresses the definition of a deportable, criminal alien, why such an alien may be non-removable, and why criminal aliens raise the most complex public policy issues regarding

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15. *See* 8 U.S.C. § 1231(a)(6) (2001).

16. *E.g.*, Phan v. Reno, 56 F. Supp. 2d 1149, 1153-54 (W.D. Wash. 1999).

17. Elizabeth Larson Beyer, Comment, *A Right or a Privilege: Constitutional Protection for Detained Deportable Aliens Refused Access or Return to Their Native Countries*, 2000 WAKE FOREST L. REV. 1029, 1031.

18. Ngo v. INS, 192 F.3d 390 (3d Cir. 1999); Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (*Zadvydas I*); Ma v. Reno, 208 F.3d 815 (9th Cir. 2000); Ho v. Greene, 204 F.3d 1045 (10th Cir. 2000); Rosales-Garcia v. Holland, 238 F.3d 704 (6th Cir. 2001).

post-final order detention. Part V provides a description of the current immigration laws concerning the detention of deportable aliens and the statutory history that preceded them. Part VI addresses the previous split of authority in the federal courts on this issue and the legal battles that culminated in the U.S. Supreme Court decision of *Zadvydas v. Davis*,[19] issued in July 2001. Part VII focuses on the numerous public policy concerns that support the basic legal arguments both for the continued detention and for the release of deportable, criminal aliens. Finally, Part VIII suggests solutions that address the competing public policy concerns raised in Part VII and attempt to balance the underlying interests at stake.

IV. CRIMINAL AND DEPORTABLE, YET NON-REMOVABLE

Aliens who were previously admitted lawfully into the United States are subsequently deportable for six major reasons: because the alien (1) has committed certain criminal offenses, (2) broke an immigration law, (3) falsified documents or failed to register certain information, (4) presents security, terrorist, or foreign policy concerns, (5) has become a public charge, or (6) engaged in unlawful voting.[20] In the language of immigration law, those who fall within the first category, that of aliens who have engaged in certain criminal conduct after entering the United States, are referred to as "criminal aliens."[21] Some of the criminal offenses carrying the consequence of deportation are crimes of moral turpitude, high speed flight, and violations of controlled substance or firearm laws.[22] Another is conviction of an "aggravated felony."[23] Congress has provided for a different definition of the term "aggravated felony" within the context of the Immigration and Nationality Act (INA) than that used in a state or federal criminal law context.[24] The INA definition includes numerous serious crimes, such as murder, rape, illicit drug trafficking, and "crime[s] of violence. . .for which the term of imprisonment [is] at least one year."[25] But even lesser offenses, such as commercial bribery, obstruction of justice, and perjury, for which the term of imprisonment is at least one year, are grounds for deportation as aggravated felonies under the INA.[26]

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19. 121 S. Ct. 2491 (2001) (*Zadvydas II*).

20. 8 U.S.C. § 1227 (2001).

21. *See id.* § 1231(a)(6) (referencing to aliens "removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4)").

22. *Id.* § 1227(a)(2).

23. *Id.* § 1227(a)(2)(A)(ii).

24. *See id.* § 1101(a)(43).

25. *Id.*

26. *Id.* One of the most amended sections of the INA under AEDPA and IIRIRA was the definition of the term "aggravated felony." OSUNA, *supra* note 14, at 4-2. Citing concerns over

For many criminal aliens, the system works as Congress intended: they serve their time for their crime and then are expelled from the country upon an immigration judge's determination that they are, in fact, within one of the statutory classes of deportable aliens. But for some criminal aliens, a fairly large crack in the system entraps those who are deportable, yet non-removable. In such a predicament, the United States wants to remove these aliens from its borders, but there is no country to take them in.[27] Often the aliens' countries of origin do not have official diplomatic relations with the United States.[28] Furthermore, the INS cannot predict when repatriation agreements will be made or if such countries will issue travel documents thereafter.[29] Many such aliens hail from Vietnam, Laos, and Cambodia, while others are from Cuba, China, Iran, or Nigeria, to name a few.[30] Other aliens are "stateless" because they either relinquished or were stripped of their citizenship when they immigrated to the United States.[31] A few stateless aliens were born in countries that refuse to accord them citizenship because the aliens are not ethnically of that nation.[32] For

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increased criminal activity by aliens and the need for greater law enforcement, Congress drastically expanded the scope of the term "aggravated felony." *Id.* For example, earlier laws included crimes of violence if the term of imprisonment imposed was at least five years. *Id.* The 1996 Acts lowered the requirement to a mere one year. *Id.* Additionally, some crimes that are considered misdemeanors under state law are now grounds for deportation as aggravated felonies under the INA. *Id.* The effect of these changes was that many more aliens would be considered aggravated felons than ever before, and thus more deportations would be required. *Id.* at 4-3.

27. Under 8 U.S.C. § 1231, an alien may designate the country to which to be removed. However, if the designated country is not willing to accept the alien, the Attorney General may remove the alien "to a country of which the alien is a subject, national, or citizen." 8 U.S.C. § 1231(b)(D) (2001). If that course is not successful, additional removal destinations may be the country from which the alien was admitted, in which is located the port the alien left from, in which the alien resided before entering the United States, that had sovereignty over the alien's birthplace when the alien was born, or in which the alien's birthplace is now located. *Id.* § 1231(b)(2)(E). A final, default provision provides that if "impracticable, inadvisable, or impossible" to remove to any country described, the alien may be removed to any country "whose government will accept the alien." *Id.* § 1231(b)(2)(E)(vii). No provision directs what should be done if all options fail and no country will accept the alien. *See generally id.* § 1231(b)(2).

28. Tebo, *supra* note 11, at 45.

29. *E.g.*, Charles Lane, *High Court to Consider Criminal Held by INS*, WASH. POST, Feb. 21, 2001, at A03; Clay McCaslin, Comment, *My Jailor Is My Judge: Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 200 (2000).

30. McCaslin, *supra* note 29, at 200.

31. Tebo, *supra* note 11, at 45.

32. For example, Kestutis Zadvydas was born in a displaced persons camp in Germany in 1948. *Zadvydas I*, 185 F.3d 279, 283 (5th Cir. 1999). Under German law, citizenship is granted according to blood, not birth. *See id.* at 292. Unfortunately, it appears the parents of Zadvydas were both Lithuanian. *Id.* Thus, Germany has refused to recognize Zadvydas as a citizen. *Id.* at 284. On the other hand, Lithuanian citizenship can be gained if a person can document that both parents were Lithuanian by blood. *Id.* at 292. Sufficient documentation is not available on the nationality of Zadvydas's father, however, and thus it is unlikely that Lithuania will ever grant citizenship to Zadvydas. *Id.*

many, their non-removable status is "the product of shifting immigration policies, individual biographies, Cold War-era refugee flows and international politics."[33]

Ideally, the detention of any alien after a final order of deportation has been entered against him or her should be for only a short period of time, during which travel documents are arranged with the receiving country. Once it is determined that no country is willing or likely to accept a deportable alien in the foreseeable future, however, the question becomes what to do with that non-removable person. Although any deportable alien, regardless of the grounds on which deportation is based, may prove to be non-removable, immigration laws provide that criminal aliens are one category of deportees most likely to be detained indefinitely as a consequence, as Part V explains in more detail.[34] Congress has provided for this scheme through legislation, primarily because criminal aliens present the most complex set of issues when the United States must choose between continuing detention or releasing these aliens from custody.[35]

When an alien cannot be expelled, the choices left to the United States appear stark: indefinitely detain the alien in hopes that repatriation will some day be possible, or release the alien from custody despite the final order of removal that expressly withdrew the alien's right to continued presence in the United States. In the case of non-criminal aliens, public policy strongly favors releasing these persons back into the community on a parole basis, while sparing the public tax dollar otherwise spent on continuing detention.[36] But the release of criminal aliens may subject society to further criminal activity or allow the alien who has proven to be a law-breaker in the past to flee any future deportation attempts.[37] Because of these latter concerns, in the years following the 1996 Acts, the INS resorted to continued detention in the cases of many non-removable, criminal aliens, despite the constitutionally questionable nature of their indefinite detention.

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33. Lane, *supra* note 29, at A03.

34. *See infra* Part V (explaining the statutory provisions that make indefinite detention possible and the exclusion categories that are subject to those provisions). One major exception to this statement are aliens who are ordered deported for security reasons, such as terrorist aliens. Such aliens are most assuredly more likely than even criminal aliens to be subject to continued detention.

35. *See infra* Part VII (analyzing the public policy issues involved in both the detention and release of deportable but non-removable, criminal aliens).

36. One source has reported the daily cost of detaining a single excludable alien in prison is $75 a day. Lane, *supra* note 29, at A03.

37. U.S. Representative Lamar Smith, a key backer of the 1996 Acts and chair of the House Immigration Subcommittee, has expressed concern, not for the financial cost of continued detention, but rather for "'the cost in lost lives and health costs and lost safety to the community if they [criminal aliens] were released.'" Robert Bryce, *Palestinian Detainee Stuck in Legal Quagmire*, AUSTIN CHRON., Vol. 18, No. 16, Dec. 18, 1998.

According to INS estimates, approximately twenty-seven hundred non-removable aliens were being indefinitely detained under deportation orders in 2000.[38] Other sources estimated their number at four to five thousand.[39] The INS also estimated that the non-removable population in their custody rose by around sixty percent over the preceding two years.[40] In 1998, one source reported that the population was growing by ten percent annually.[41] Although the precise rate is unclear, INS detainees certainly have been the fastest growing segment of the prison population in the United States in recent years.[42] This fact is largely due to the many changes to the detention and deportation provisions of the INA that resulted from the passage of the 1996 Acts.

V. STATUTORY LAW, PAST AND PRESENT

The INA, as amended by the 1996 Acts, arguably provides the Attorney General, as head of the INS, with the discretion to indefinitely detain deportable, criminal aliens who are non-removable.[43] While the history of international politics and changing statehoods indicates that the dilemma created by a non-removable alien is not new,[44] the practice of indefinitely detaining such aliens does appear to be a relatively recent development. In fact, a historical review of post-final order detention laws reveals that, for over seventy years, the United States routinely released deportable aliens from custody when their removal could not be effected within a certain time period.

From 1917 to 1990, the post-final order detention of deportable aliens was limited in length, regardless of any alien's chances of deportation. The Immigration Act of 1917, the predecessor to the INA, did not set an express limit for such detention.[45] In fact, it provided only that "deportable aliens should be 'taken into custody and deported.'"[46] The federal courts, however, regularly imposed a "reasonable time" limit, which was

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38. Lane, *supra* note 29, at A03.

39. National Public Radio Broadcast, Feb. 21, 2001 [hereinafter NPR], *found at* 2001 WL9326593 (reporting on the U.S. Supreme Court's hearing of oral arguments in the *Zadvydas II* case).

40. Lise Olsen, *Seattle "Lifer" Has His Day in Highest Court*, SEATTLE POST-INTELLIGENCER, Feb. 20, 2001, at A1.

41. Bryce, *supra* note 37.

42. *Id.*

43. *See infra* notes 61-71 and accompanying text for a description of the current statutory law and how it provides this possibility.

44. Ma v. Reno, 208 F.3d 815, 828 (9th Cir. 2000) ("Prior to 1952. . ., just as now, there were cases involving aliens who could not be deported for various reasons. . . .").

45. Brief for the Petitioner at 30, *Zadvydas II*, 121 S. Ct. 2491 (U.S.) (99-7791).

46. *Ma*, 208 F.3d at 828 (quoting An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 19, 39 Stat. 874, 889 (1917)).

generally interpreted as no longer than four months.[47] In 1952, Congress re-codified the immigration laws and created the INA that remains in effect today in amended form.[48] As originally written at that time, the INA expressly provided for a six-month limit on the detention of any alien ordered removed.[49] If removal did not occur within that period, the law required supervised release of the alien.[50]

In 1990, this bright-line rule requiring release after six months was amended, and new provisions were added to permit, for the first time, the detention of a limited group of aliens beyond the normal removal period.[51] Under the amendment, an alien convicted of an aggravated felony could not be released at any time, even under supervision.[52] The only exception afforded was if an alien had previously been lawfully admitted for permanent residence and the INS determined that the alien was neither a danger to the community nor a flight risk.[53] Thus, from 1990 until the 1996 Acts were enacted, the law expressly required that the INS detain, for as long as necessary to effectuate their removal, any aliens convicted of aggravated felonies who could not meet the limited exception. Presumably, that detention could be indefinite and did not depend on the probability of removal.

The first of the 1996 Acts, the AEDPA enacted in April of 1996, had three significant impacts on this area of law. First, it increased the number of aliens subject to deportation by greatly expanding the definition of "aggravated felony" to include more crimes than ever before.[54] Second, it broadened the group of criminal aliens subject to post-final order mandatory detention beyond aggravated felons to include those convicted of controlled substance offenses, firearm offenses, and other serious crimes.[55] Third, it eliminated the exception provided under the 1990

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47. *Id.* at 828-29.

48. *See* LEGOMSKY, *supra* note 10, at 1.

49. Brief for the Petitioner at 30-31, *Zadvydas II* (No. 99-7791); Beyer, *supra* note 17, at 1033.

50. Beyer, *supra* note 17, at 1033.

51. *Id.* at 1033-34.

52. *See* former 8 U.S.C. § 1252 (1991).

53. *Id.* In 1991, this provision was modified slightly to encompass aliens lawfully admitted, regardless of permanent residency, and to transfer the burden of proof onto the alien. Brief for the Petitioner at 32 and n.19, Ashcroft v. Ma, 121 S. Ct. 2491 (U.S.) (No. 00-38).

54. *See supra* note 26 and accompanying text. Another amendment, closely related, greatly reduced the availability of deportation waivers to criminal aliens. Alex Tizon, *Judges to Decide What to Do with Criminal Aliens*, SEATTLE TIMES, June 18, 1999. Previously, a deportation waiver might be granted to a criminal alien who had rehabilitated, lived in the United States many years, or could demonstrate that deportation would produce an extreme hardship on a citizen or resident alien family member. *Id.*

55. Phan v. Reno, 56 F. Supp. 2d 1149, 1152 (W.D. Wash. 1999); Brief for the Petitioner at 32, *Ashcroft* (No. 00-38).

amendment[56] for release of aliens previously admitted lawfully, who were determined by the INS to pose no danger to the community or risk of flight.[57] The result of these changes was that, under AEDPA, the INS had no discretion whatsoever to release most criminal aliens, regardless of their removal prospects.[58] The changes under AEDPA to the laws relating to the detention and release of aggravated felons did not remain in effect for long, however. Within five months of enacting AEDPA, Congress restored some release discretion to the INS, through the second of the 1996 Acts, the IIRIRA,[59] which amended the INA once again and provided what remains the current law.

Through IIRIRA, Congress created a ninety-day "removal period," which begins once a final removal order is issued.[60] Amended INA provisions now state that any deportable alien "shall be detained" during those ninety days pending deportation.[61] Furthermore, the INA specifies that aliens ordered deported for criminal offenses shall "under no circumstances" be released during that period.[62] If removal is not effectuated within the first ninety days, the law mandates "supervision" under regulations that imply release from physical detention.[63] However, the law further provides that criminal aliens "may be detained beyond the removal period."[64] It is this final provision, added to the INA by the IIRIRA amendments of 1996, that arguably indicates Congressional sanctioning of the indefinite detention of non-removable, criminal aliens.

The INS, as a federal agency headed by the Attorney General, is charged with the responsibility of executing the laws embodied in the INA. When enacting IIRIRA, however, Congress did not provide specific

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56. *See supra* text accompanying notes 52-53.

57. Brief for the Petitioner at 32, *Ashcroft* (No. 00-38).

58. Brief for the Petitioner at 32, *Zadvydas II*, 121 S. Ct. 2491 (U.S.) (No. 99-7791).

59. *Phan*, 56 F. Supp. at 1152.

60. *See* 8 U.S.C. § 1231(a)(1) (2001). If a stay of removal is ordered while the order is judicially reviewed, the removal period will begin the date the court enters a final order of removal. *Id.* § 1231(a)(1)(B)(i). If the order of removal is entered while the alien is serving a criminal sentence, the removal period does not begin until he or she is released from that detention. *Id.* § 1231(a)(1)(B)(iii).

61. *Id.* § 1231(a)(2).

62. *Id.* This provision also applies to aliens found inadmissible on criminal grounds and those found inadmissible or deportable for engaging in terrorist activity. *Id.*

63. *See id.* § 1231(a)(3). The statute provides that such supervision will be through regulations prescribed by the Attorney General and shall include requirements that, among other things, require the alien to appear before an immigration officer periodically and obey reasonable written restrictions on the alien's conduct or activities. *Id.*

64. *Id.* § 1231(a)(6). Other aliens who may be detained beyond this removal period are those who fall within any category of inadmissible alien, those who are deportable for violating their nonimmigrant status or conditions of entry or for security reasons, and any alien "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. . . ." *Id.*

guidance as to when the INS should detain inadmissible or criminal aliens beyond the ninety-day removal period. Thus, in the years following the 1996 Acts, the INS, under the supervision of the Attorney General, introduced implementing regulations that addressed this question of discretion.[65] These implementing regulations, which themselves were amended more than once between 1996 and 2001,[66] last provided that a non-removable alien may be released from custody "if the alien demonstrates. . .that his or her release will not pose a danger to the community or to the safety of other persons or to property or [present] a significant risk of flight. . . ."[67] The regulations allowed continued detention of any alien unable to meet that burden.[68] An initial custody determination, consisting of a review of the alien's records and any written information submitted on his or her behalf, was to be conducted prior to the expiration of the ninety-day removal period in order to determine if such a burden could be met.[69] Under further procedures, if the alien's deportation was not effectuated and no release was granted by the end of the ninety-day period, a subsequent review was mandated "at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable."[70] Upon continued detention, subsequent reviews were to be held at least once a year.[71]

VI. THE LEGAL BATTLES

Litigation over the continued detention of non-removable aliens beyond the ninety-day removal period was inevitable and produced many constitutional challenges from aliens, along with diverging statutory interpretations from courts. It is important to note that the aliens who initiated such suits did not challenge the authority of Congress or the INS to deport them.[72] In fact, many would have been happy to be deported, given the sole alternative of remaining in detention indefinitely.[73] Some

65. *See* 8 CFR §§ 236.1, 241.4 (2001).

66. The original implementing regulations were amended and added to in 1999 by the "Pearson Memo," which called for periodic detention reviews. Phan v. Reno, 56 F. Supp. 2d 1149, 1152 (W.D. Wash. 1999). More amendments, proposed by the INS in 2000, revised the procedure for detention reviews and made up the most recent regulations prior to the U.S. Supreme Court's ruling in *Zadvydas II*. *See Proposed Rule on Detention of NonCitizens Ordered Removed Would Permit Indefinite Detention*, IMMIGRANTS' RIGHTS UPDATE, Vol. 14, No. 4, July 26, 2000.

67. 8 CFR § 241.1(d)(1) (2001).

68. *Id.* § 241.4(a).

69. *Id.* § 241.4(h)(1).

70. *Id.* § 241.4(k)(2).

71. *Id.*

72. McCaslin, *supra* note 29, at 206.

73. *Id.* ("[M]ost of these people would be more than happy to return to their countries of origin rather than waste away for years in a prison cell in the United States."). One alien plaintiff who challenged his continued detention went so far as to say, "'Send me anywhere, send me to the

suits initiated on behalf of detained criminal aliens charged that a proper interpretation of the law was one that limited the statutory authority of the INS to hold an alien beyond the removal period only for "a reasonable period,"[74] as was regularly held under the Immigration Act of 1917.[75] Still other suits went further to urge that the indefinite detention of deportable aliens, regardless of prior criminal conduct, is a violation of the alien's due process rights.[76]

In defending the numerous *habeas corpus* suits filed by detained aliens over the past few years, the INS has argued that the law, as enacted by Congress, gives the Attorney General the authority and discretion to continue detaining criminal aliens indefinitely if necessary.[77] The INS maintained that such discretion could and should be exercised in order to ensure public safety and effectuate deportation orders, so long as periodic reviews occurred and the United States continued to seek repatriation through diplomatic channels.[78] The INS also argued that aliens lose any constitutional protections once gained through prior, lawful admittance when a final deportation order is entered against them.[79] In essence, the INS took the position that an alien who has been ordered deported has no greater rights than an inadmissible alien, who has never lawfully entered the United States and whose constitutional rights are few, if any.[80]

In October 2000, the U.S. Supreme Court agreed to take up the issue because of a split in the federal courts that had produced inconsistent results in the *habeas corpus* suits brought by criminal aliens across the country.[81] The Eleventh and Fifth Circuits had affirmed the government's authority to continue detention, while the Second and Ninth Circuits had awarded decisive victories to detained aliens.[82] The legal battles culminated in 2001 in a consolidated case before the Court involving the Ninth Circuit case of *Ma v. Reno*[83] and the Fifth Circuit case of *Zadvydas*

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moon'" and to urge that if given the chance to go to Germany, one of the countries being asked to take him, he would "'go there in a heartbeat.'" Eric Schmitt, *Constitutional Case of a Man Without a Country*, N.Y. TIMES NAT'L, Mar. 13, 2001, at A16.

74. *E.g.*, Ho v. Greene, 204 F.3d 1045, 1048-49 (10th Cir. 2000).

75. *See supra* notes 45-47 and accompanying text.

76. *E.g.*, *Zadvydas I*, 185 F.3d 279, 283 (5th Cir. 1999); Rosales-Garcia v. Holland, 238 F.3d 704, 707 (6th Cir. 2001); Phan v. Reno, 56 F. Supp. 2d 1149, 1151 (W.D. Wash. 1999).

77. *E.g.*, Ma v. Reno, 208 F.3d 815, 821 (9th Cir. 2000).

78. Schmitt, *supra* note 73, at A16.

79. Brief for the Petitioner at 50, Ashcroft v. Ma, 121 S. Ct. 2491 (U.S.) (No. 00-38) (citing a 10th Circuit ruling adopting the same argument in *Ho*, 204 F.3d at 1057-59).

80. *See id; see also supra* notes 16-17 and accompanying text.

81. *See Ma*, 208 F.3d at 815; *Zadvydas I*, 185 F.3d at 279.

82. Warren Richey, *Immigrants Stuck in Prison Limbo*, CHRISTIAN SCI. MONITOR, Feb. 21, 2001, at 2.

83. 208 F.3d 815 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3249 (U.S. Oct. 10, 2000) (No. 00-38).

v. Underdown[84] *(Zadvydas I)*, which led to the U.S. Supreme Court's decision of *Zadvydas v. Davis*[85] *(Zadvydas II)*.

In *Ma*,[86] the Ninth Circuit held that the INS lacked authority to indefinitely detain Kim Ho Ma,[87] a deportable, criminal alien originally from Cambodia.[88] Although the trial court ruled that the indefinite detention of Ma violated his substantive due process rights,[89] the appellate court applied the canon of constitutional avoidance and affirmed on a different basis.[90] Employing statutory construction, the Ninth Circuit ruled that INS authority to detain aliens beyond the ninety-day removal period was limited to a "reasonable time" in which to effect deportation.[91] Furthermore, the appellate court concluded that detention could not continue beyond the ninety-day removal period when there is "no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future."[92]

Although the *Ma* case was not decided on constitutional grounds, the case did contain important dicta relevant to the due process issues raised by Kim Ho Ma. In employing the canon of constitutional avoidance to circumvent the due process arguments, the Ninth Circuit had to first find that a substantial constitutional issue was at hand,[93] a finding not possible if aliens are stripped of their due process rights by a final order of deportation. The Ninth Circuit, in fact, expressly rejected the INS argument that the constitutional rights of deportable aliens are no greater than those of inadmissible aliens.[94]

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84. 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 99-7791).

85. 121 S. Ct. 2491 (2001).

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

87. *Id.* at 818.

88. *Id*; *see also supra* notes 1-9 and accompanying text (describing the life of Kim Ho Ma).

89. The *Ma* case was an appeal of Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999), a decision that addressed five lead cases chosen out of more than one hundred habeas corpus petitions. The *Phan* court ruled that substantive due process rights are implicated by indefinite alien detention and, therefore, a strict scrutiny test should be applied to each individual case. *Phan*, 56 F. Supp. 2d at 1156. The *Phan* court concluded that a balancing test between the likelihood that deportation will be effectuated and the dangerousness of a petitioner would be necessary, but that if there is no reasonable chance of deportation, further detention would be unconstitutional. *Id.*

90. *See Ma*, 208 F.3d at 818-19. The *Ma* court did, however, refer to such challenges as "substantial constitutional questions." *Id.* at 819.

91. *Id.* at 818. The *Ma* court provided three justifications for its ruling: a reasonable reading based on lack of intent to the contrary, prior interpretations of the similar provision in the Immigration Act of 1917, and a canon of construction that requires courts to construe congressional legislation in a manner that avoids violating international law. *Id.* at 822.

92. *Id.* at 822.

93. *Id.* at 823.

94. *Id.* at 825-26.

The INS had more success with this argument in the Fifth Circuit, however.[95] In *Zadvydas I*, the Fifth Circuit overruled a lower court holding that indefinite detention violated the due process rights of a non-removable alien.[96] The Fifth Circuit found that the government's interest in deporting resident aliens is the same as in excluding arriving aliens: the protection of national sovereignty.[97] The Fifth Circuit further cited precedent for the proposition that the detention of excludable, arriving aliens does not constitute a violation of constitutional rights, even when no country is willing to receive the alien.[98] Coupling these two findings, the Fifth Circuit ruled that a deportable alien's request for release could not be stronger than an inadmissible alien's similar claim, because the two involve the same asserted right of the alien and the same governmental interest.[99] Thus, in the Fifth Circuit's view, if the deportable alien's claim to due process is no stronger than the inadmissible alien's claim, precedent that denies release to the latter must be controlling on the former as well.[100]

In June 2001, the U.S. Supreme Court issued its decision in these two merged cases. The 5-4 decision of *Zadvydas II*[101] held that the indefinite detention of deportable aliens raised serious constitutional concerns, that the statute was therefore construed to contain an implicit "reasonable time" limitation, and that the application of such a limitation is subject to federal court review.[102] Furthermore, the Court recognized, "for the sake of uniform administration in the federal courts," a presumptive six-month limitation beyond which "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future the Government must respond with evidence sufficient to rebut that showing."[103] To clarify its point further, the Court stated that as the period of post-removal confinement grows, "what counts as the 'reasonably foreseeable future' conversely would have to shrink."[104]

Regarding due process claims, the Court stressed that once aliens enter the United States, the Due Process Clause of the U.S. Constitution applies to aliens as "persons," "whether their presence here is lawful, unlawful, temporary, or permanent" and even when a final order of deportation has

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95. The *Zadvydas I* case came out before *Ma* and was recognized in a footnote by the Ninth Circuit. *Ma*, 208 F.3d at 826 n.23. However, the *Ma* court stated that it "seriously question[ed] the Fifth Circuit's conclusion." *Id.*

96. *Zadvydas I*, 185 F.3d 279, 297 (5th Cir. 1999).

97. *Id.* at 296.

98. *Id.* at 290.

99. *See id.* at 295-96.

100. *See id.*

101. *Zadvydas II*, 121 S. Ct. 2491 (2001).

102. *Id.* at 2495.

103. *Id.* at 2505.

104. *Id.*

been issued.[105] The Court concluded that the U.S. Constitution therefore demands greater procedural protection to aliens than that which was available under the INS-implemented scheme of recent years.[106] To avoid such serious constitutional issues, the Court thus interpreted the statute to imply that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized"[107] and supervised release under specified conditions must follow. In order to reach that conclusion, the Court first found that the statute contained no "clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."[108]

In July 2001, responding to the *Zadvydas II* decision, Attorney General John Ashcroft issued interim procedures to guide custody reviews and directed the INS to develop new implementing regulations.[109] Such regulations will set forth the procedure that detained aliens must follow if they wish to claim that there is no significant likelihood of their removal in the foreseeable future.[110] Furthermore, the Ashcroft memorandum provided that all future custody reviews should include a consideration of the historical record of the INS in achieving removal to any relevant country, along with any unique circumstances that an alien may show, which indicate removal is less likely in his or her case than for other aliens being removed to the same country.[111] Attorney General Ashcroft also directed the INS to immediately renew efforts to deport those aliens detained the longest, while expeditiously concluding ongoing custody reviews for all aliens, with special emphasis on those having been detained the longest.[112]

The decision of the Supreme Court in *Zadvydas II* will likely result in the eventual release of many, if not all, of the non-removable criminal aliens previously being detained indefinitely. However, the decision does not preclude the possibility that the INS will continue to exercise discretion to prolong detention in some cases beyond the presumptive six-month limit, if it can show a significant likelihood of removal in the reasonably foreseeable future. Also, because the Court framed its decision as one of constitutional avoidance, the ruling does not preclude Congress

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105. *Id.* at 2500.

106. *See id.* at 2499-2500.

107. *Id.* at 2503.

108. *Id.* at 2502.

109. Interpreter Releases, *Attorney General Issues Interim Procedure for Post-Order Custody Review after* Zadvydas, July 30, 2001, *found at* 78 No. 29 Interpreter Releases 1228.

110. *Id.* at 1228-29.

111. *Id.* at 1229.

112. *Id.*; FedNet Government News, *Department of Justice Notice of Memorandum*, July 24, 2001, *found at* 2001 WL 23813261.

from amending the INA to expressly provide for continued and indefinite detention, if it sees fit. In either situation, the public policy issues raised by the indefinite detention of deportable, criminal aliens, which are addressed in the next Part of this Article, will be highly relevant to future actions taken by either the executive or legislative branches of the federal government. The debate over how the United States should deal with the criminal, yet non-removable, segment of our nation's alien population may very well continue.

VII. COMPETING PUBLIC POLICY CONCERNS

The underlying public policy concerns involved in the question of what is to be done with non-removable, criminal aliens "pit[] fundamental U.S. priorities [against one another]: ensuring community safety vs. guarding against undue imprisonment; preserving individual rights vs. protecting the nation's borders."[113] While those who favor continued detention have argued that criminal aliens only receive their just desserts when kept in jail, others who oppose the indefinite nature of continued detention have described this treatment of aliens as "morally repugnant."[114] A close examination of the debate reveals that both sides present valid public policy concerns that should be factored into any future judicial, legislative, or executive decisions that will touch upon this matter.

A. *Arguments for Detention*

The primary advocate of continued detention has been the federal government, through the Attorney General as the head of the INS. Prior to the *Zadvydas II* decision, the government argued that the INS needed the discretion to continue detaining certain criminal aliens in order to protect public safety from the risk of future criminality and to retain national sovereignty by eliminating the risk of alien flight.[115]

There is certainly little doubt that our government has the duty to protect the public from criminal activity. The argument for continued detention to prevent future criminality rests on the presumption that the United States "must tolerate a certain risk of recidivism from our criminal citizens, [but] need not be similarly generous when it comes to [criminal aliens]."[116] As well, the second concern of the INS, regarding possible

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113. Gwenda Richards Oshiro, *Cells Stay Locked for "Lifers" Who've Done Their Time*, THE OREGONIAN, Aug. 10, 1998, at A01.

114. *Id.*

115. Lane, *supra* note 29, at A03.

116. *Zadvydas I*, 185 F.3d 279, 296-97 (5th Cir. 1999). David Martin, a former general counsel for the INS, described the decisions to keep many non-removable, criminal aliens in detention as

flight risks after release, presents a valid governmental concern because an alien may easily disappear within the country if deportation becomes feasible in the future.[117] Thus, the INS and its supporters maintained that INS implementing regulations provided a suitable "safety valve" for the release of aliens who could establish that they did not present these risks.[118] For example, the implementing regulations attempted to address the recidivism problem by providing factors to be weighed in custody reviews that included the alien's criminal history, disciplinary problems while in INS custody, and "any other information that is probative of whether the alien is likely to engage in future criminal activity."[119]

In addition to the public safety and flight risk issues raised by the release of criminal aliens, an additional argument in support of continued detention concerns the pressure placed on foreign governments to grant repatriation of deportees. Presumably, a country of origin may be far more inclined to grant entry to a deportee if its officials know that one of its citizens will otherwise sit in jail indefinitely.[120] On the other hand, when the alternative to receiving a person is that he or she will be released back into the United States, it is unlikely that any foreign government would feel much societal pressure to issue travel documents.[121] In a related argument, the alien himself, his family, and human rights groups would not be greatly motivated to lobby a foreign government for admittance once the alien has been released from custody in the United States, even when conditions might be placed on such release.[122]

Other grounds for support of the continued detention of non-removable aliens focus on the effects of custodial release on the effectiveness of U.S. laws and national sovereignty. First, to release an alien after an order of deportation has become final suggests weakness in U.S. deportation laws by allowing the alien the very same freedom to be in the United States that the order denies.[123] Along the same lines, the release of non-removable

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the result of INS concern that it "may get blamed if the person then commits another violent act [upon release]." NPR, *supra* note 39.

117. *Zadvydas I*, 185 F.3d at 297.

118. *See* Lane, *supra* note 29, at A03 (quoting attorney Richard Samp, a lawyer for Washington Legal Foundation, which filed a friend of the court brief with the U.S. Supreme Court in support of the INS).

119. 8 C.F.R. § 241.4(e).

120. *See Zadvydas II*, 121 S. Ct. 2491, 2510 (2001) (Kennedy, J., dissenting).

121. *Id.*

122. U.S. Supreme Court Official Transcript at *32 (2001 WL 182678), *Zadvydas II*, 121 S. Ct. 2491 (U.S.) (Nos. 99-7791, 00-38).

123. Ho v. Greene, 204 F.3d 1045, 1058 (10th Cir. 2000); Daniel Dinger, Comment, *When We Cannot Deport, Is it Fair to Detain?: An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231 and the 1999 INS Interim Procedures Governing Detention*, 2000 B.Y.U. L. REV. 1551, 1589-90, IV.B. (2000).

deportees would violate U.S. national sovereignty, to an extent, by effectively depriving the U.S. government of its sovereign right to exclude aliens from its territory.[124] If the release of non-removable aliens were mandatory, any foreign government that refuses to accept an alien would effectively be forcing the United States to violate its own immigration laws and give up a portion of its control over national borders.[125] This argument, of course, holds true for the release of all non-removable aliens, regardless of deportation grounds.

Many policy reasons advanced by the federal government to justify the deportation of criminal aliens are similarly advanced to justify continued detention of non-removable aliens. Many members of the public have stressed the fact that an alien lawfully admitted to the United States for immigration purposes has been given a privilege, not a right, to be here.[126] Their time here has been described as a "grooming period," during which the alien has an opportunity to prove his or her worth as a citizen.[127] Criminal aliens, it is argued, have squandered that opportunity,[128] one which millions of people around the world wish to experience.[129] For these and other reasons, including the retribution that many feel is due criminal aliens, much of the public is not readily inclined to lament the plight of non-removable, criminal aliens.

B. *Arguments for Release*

On the other side of the debate, supporters of the supervised release of non-removable, criminal aliens from continued INS custody offer both philosophical and practical reasons why the United States should not detain criminal aliens indefinitely. These supporters of reform predict that changes in the law are "inevitable because even Americans who favor less immigration recognize a need for fundamental fairness."[130] In fact, many of the arguments for release have centered on fairness and the rights of aliens to equal protection of their liberty interests.

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124. Dinger, *supra* note 123, at 1590, 1595.

125. *Zadvydas II*, 121 S. Ct. at 2510 (Kennedy, J., dissenting); Dinger, *supra* note 123, at 1590.

126. *See, e.g.*, Richey, *supra* note 82, at 2.

127. Oshiro, *supra* note 113, at A01 (quoting Dan Stein, the executive director of the Federation for American Immigration Reform, a citizens lobby for tighter immigration controls).

128. Bryce, *supra* note 37; Oshiro, *supra* note 113, at A01.

129. Oshiro, *supra* note 113, at A01 (quoting attorney Paul Hribernick). Mr. Hribernick made the point that it is hard to sympathize with a criminal alien "when you think of the brother and sister of a Filipina national who have followed all the rules [and] who are waiting and waiting . . . to be allowed to come into the United States." *Id.*

130. Tebo, *supra* note 11, at 51.

Indeed, the liberty interest of an alien may very well outweigh the public's interest in preventing possible, or even probable, future criminality.[131] In an interview with National Public Radio, Kim Ho Ma's attorney expressed the simple, underlying point in support of release when he said: "[T]he safest thing to do, if we wanted to live in a purely safe society, is to lock everybody up[,] whoever commits a crime[,] for their lifetime, and we simply don't do that. We've made the judgment as a nation politically that we don't do that."[132] To detain criminal aliens on the basis of assumed future dangerousness when society accepts U.S. citizen ex-offenders back into its ranks on a regular basis[133] appears "imbalanced"[134] and unjust to many opponents of continued detention. Furthermore, according to at least one commentator, if future dangerousness as a basis for detention is not permitted, what remains is the possibility that these aliens are, in effect, political prisoners, in jail not for their conduct, but rather for being from the wrong country.[135]

Beyond constitutional arguments, however, exist many more justifications for limiting the detention of non-removable aliens. One very practical reason to release an alien is the cost of detention. One estimate places the daily expenditure for detaining a single alien at seventy-five dollars per day.[136] If an alien is detained indefinitely, taxpayers foot the bill indefinitely. In contrast to the assured financial consequence of continued detention is the fact that, while release poses real risks of future crime and flight, those risks are merely possible, not inevitable, in all cases. Of course, some of the public funds saved by a policy of release would necessarily be needed to support the costs of post-release supervision.[137] But at the same time, released aliens could become productive members of society to everyone's benefit.[138] Society and the government would also

131. Richey, *supra* note 82, at 2 (quoting Richard Samp, a lawyer for Washington Legal Foundation, which filed a friend of the court brief with the U.S. Supreme Court in support of the INS).

132. NPR, *supra* note 39.

133. Lane, *supra* note 29, at A03.

134. Oshiro, *supra* note 113, at A01 (quoting attorney Paul Hribernick: "[I]t smacks us Americans as being imbalanced. We give members of our society lots of second chances.").

135. Bryce, *supra* note 37 (quoting attorney D'Ann Johnson).

136. Lane, *supra* note 29, at A03.

137. For example, one requirement of supervised release, which is currently available to non-criminal aliens, is that the alien "appear before an immigration officer periodically for identification." 8 U.S.C. § 1231 (2001). Administrative costs will accompany parole requirements such as this.

138. In Kim Ho Ma's own words: "Why waste taxpayers' money indefinitely holding people like me who have already served their time for their mistakes, when we can be out there being productive members of society?" Olsen, *supra* note 40, at A1.

benefit from the freeing up of jail space and resources for use by the criminal justice system, rather than the INS.[139]

In considering this matter, it is also important to note that the criminal justice system has already seen fit to previously release these aliens after their jail sentences.[140] No one asserts, of course, that it is inappropriate for criminal aliens to serve jail time for their crimes. However, subsequent and lengthy detention by the INS becomes, essentially, a second sentence, no different from the first in terms of daily conditions. Many INS detainees are kept in prisons that also house criminal convicts.[141] They wear prison uniforms and are subject to the same rules and regulations regarding visitors, possessions, and activities.[142] They may even share cells with criminal inmates.[143] Some reports indicate that alien detainees are subject to physical and psychological abuse, solitary confinement, and strip searches.[144] Often, they are placed in jails located great distances from where their families live, making it difficult to maintain communication.[145] Thus, although they are not prisoners *per se*, their detention by the INS differs very little from that of criminal convicts serving punitive sentences.

Consideration of the international aspects of this issue provides the basis for two additional arguments favoring supervised release over continued detention. First, many of the countries to which the United States would like to send these aliens would rather not have a repatriation agreement with the United States, precisely because these aliens are undesirable criminals.[146] The fact that even the United States, considered one of the most powerful and stable countries in the world, will not permit such persons to remain at large within its borders provides little motivation for other countries to open their borders to them. Arguably, if an alien has been released under supervision back into American society, the United States may be more successful in negotiating travel documents for that alien because the relevant foreign country will perceive the alien as less dangerous.

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139. *See* Brief for the Petitioner at 37, Ashcroft v. Reno, 121 S. Ct. 2491 (U.S.) (No. 00-38) (citing legislative history in which Senator Kennedy criticized the mandatory and indefinite detention of criminal aliens under AEDPA).

140. NPR, *supra* note 39 (quoting Jay Stansell, Kim Ho Ma's attorney, who noted that criminal aliens have "gone through a state criminal justice system where the state has said, 'You're ready to go back to your home.'").

141. Tebo, *supra* note 11, at 44.

142. *Id.* at 44-45.

143. *Id.*

144. McCaslin, *supra* note 29, at 201.

145. Chris Hedges, *Spousal Deportation, Family Ruin*, N.Y. TIMES, Jan. 10, 2001, at B1.

146. Lise Olsen, *"Men Without Countries" Create a Class of Unremovables*, SEATTLE POST-INTELLIGENCER, April 6, 1999, at A1 (quoting Richard Smith, an INS district director).

Second, some organizations, including Human Rights Watch, have condemned the indefinite detention of these aliens as arbitrary and in clear violation of international law.[147] Amnesty International is exploring the possibility that it is cruel and inhumane treatment under international standards.[148] Although from a U.S. standpoint international law does not always provide a strong basis of support in any argument, one scholar has urged that the important issue may not be the legal ramifications in a court, but rather the United States' own credibility regarding human rights in the world-wide court of public opinion.[149]

Detention or release are not the only options available to the government in dealing with non-removable, criminal aliens. House arrest, halfway houses, electronic monitoring, and intensive supervision all provide reliable means of keeping track of criminal aliens without confining them to prisons and detention centers. Additionally, there is no reason why released aliens cannot be punished again by the criminal justice system for any future crimes they might commit post-release.[150] No supporter of release has asked for criminal aliens' unconditional freedom or for pardoning them, only for an end to the indefinite detention to which these people have been subject.

VIII. SOLUTIONS THAT BALANCE THE COMPETING PUBLIC POLICY CONCERNS

The debate over detention or release involves strong arguments on both sides and covers a wide spectrum of emotion, ranging from indignation for the opportunity squandered by criminal aliens to sympathy for the extreme hardships aliens might face because of their birthplaces. The issue is multifaceted, involving a confluence of legislation, INS regulation, judicial interpretation, and international relations. While there is not any one solution to address all the concerns involved, there are many direct and indirect reforms that can function together to balance the competing interests of aliens and the federal government.

147. BRYCE, *supra* note 37; *see also* Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000) (recognizing the international prohibition against indefinite detention contained within the International Covenant of Civil and Political Rights and the possibility of violating such if the detention statute was construed to authorize indefinite detention).

148. Bryce, *supra* note 37.

149. *Id.* (quoting Burns H. Weston, Assoc. Dean for Int'l & Comp. Legal Studies at the Univ. of Iowa Law Sch.).

150. Richey, *supra* note 82 (noting the alien "can be tried and sentenced to more prison time").

A. *Direct Reform*

The most direct reform relates to the procedure used in determining whether detention beyond the removal period is necessary and just. One of the worst criticisms in recent years of the INS's procedure for custody reviews has been that implementation was subjective and inefficient in practice.[151] Custody reviews often occurred without notice to the detainees and without an opportunity for them or their families to present information.[152] A more formal hearing process before an immigration judge, with prior and sufficient notice given to the alien, would allow a non-removable alien to properly plead his case and confront the evidence against him.[153] To this end, the American Bar Association (ABA) has called for the granting of a fair hearing to determine if a flight or security risk actually exits.[154] A similar suggestion was made by a federal district court that:

> [a]t a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release pending deportation. The immigration judge must actually consider the factors set forth at 8 C.F.R. § 241.4 and explain how they apply to each petitioner's unique circumstances. Petitioners must also be able to appeal any adverse denial of a release request to the [Board of Immigration Appeals].[155]

Putting the decision to continue detention into the hands of immigration judges and the Board of Immigration Appeals would not only provide more fundamental fairness, it would also address the inconsistencies that have plagued detention decisions made by INS officials nationwide.[156] One further procedural change should be to shift the burden of proof from the alien to the INS,[157] making it the government's responsibility to show how its interests in continued detention outweigh the alien's liberty interest.[158]

Another approach to the issue is for Congress and the INS to initiate the use of alternatives to detention. In order to meet the government's

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151. Lane, *supra* note 29, at A03.

152. Olsen, *supra* note 40, at A1.

153. *See* McCaslin, *supra* note 29, at 224.

154. Tebo, *supra* note 11, at 46.

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

156. *See* Tebo, *supra* note 11, at 50 (discussing the lack of "rhyme or reason" to who currently is released and who is detained).

157. *Id.* at 46.

158. Dinger, *supra* note 123, at III.B.2.

concerns for preventing crime and flight, house arrest, halfway houses, and electronic monitoring should be utilized. In fact, Congress explored such options in a bill known as H.R. 4966, which aimed at increased fairness toward aliens and included a pilot program "to determine the viability of supervision, through means other than confinement in a penal setting, of aliens who. . .have a criminal record that includes only nonviolent minor offenses."[159] This legislation passed the House of Representatives unanimously in 2000, but died when Congress adjourned for the year without a final Senate vote.[160] Such legislation should be re-introduced in order to explore more humane means of addressing governmental concerns. As well, Congress should consider amending the INA to include laws analogous to the "three strikes" sentencing often employed in the criminal justice system. Aliens released from INS detention could be placed on notice that they are being given a second chance and that if they fail to stay within the law, they will not be released again.

B. *Indirect Reform*

One indirect way of partially resolving the dilemma of non-removable aliens is to reduce the number of aliens subject to deportation in the first place. Numerous organizations and publications have called for amendments to the immigration laws that would soften some of the harsher aspects of the 1996 Acts and restore some discretion to immigration judges. For example, deportation waivers, which at one time could be granted by immigration judges to aliens who had lived in the United States for a long period of time and who could show rehabilitation and hardship to their citizen family members,[161] should be made available once again. The ABA[162] supports this, as does the INS.[163] As well, H.R. 4966 included a provision for restoring waiver availability to a limited group of criminal aliens.[164] Such waivers would send the right message to criminal aliens that the efforts of those who have made a "long pilgrimage back to becoming productive members of society" have not been made in vain.[165]

Other approaches to reducing the population of non-removable aliens focus on the foreign policy issues involved. First, the United States should

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159. H.R. 4966, 106th Cong., § 124 (1999).

160. Hedges, *supra* note 145, at B1.

161. *See* Tizon, *supra* note 54.

162. Tebo, *supra* note 11, at 46.

163. Chris Hedges, *Condemned by Past Crimes: Deportation Law Descends Sternly*, N.Y. TIMES, Aug. 30, 2000, at B1 (quoting Bill Strassberger, an immigration service spokesman).

164. H.R. 4966, 106th Cong., § 202 (1999); *see* Tebo, *supra* note 11, at 46.

165. Hedges, *supra* note 163, at B1.

make it a priority to increase pressure on foreign nations to enter into repatriation agreements. Such agreements would facilitate the deportation of many non-removable aliens. Second, it has been suggested that the United States should consider banning legal immigration from any country that refuses to grant entry petitions for these detained aliens.[166] It is uncertain if such a tactic would truly encourage foreign governments to open their borders to deported criminals. However, while not reducing the current numbers, such a policy would at least slow the rate of increase in the population of non-removable aliens entering the United States who we may one day want, but be unable, to deport.

The recent trend toward stricter immigration laws has had a tremendous effect on the number of aliens who now fall within the category of deportable, criminal aliens. Some necessary reversals in that trend would go a long way to reducing those numbers. First, the definition of "aggravated felony" should be amended to restore a certain amount of proportionality between the severity of an offense and the consequence of deportation.[167] Second, Congress should repeal the retroactive application of the 1996 Acts.[168] H.R. 4966 would have done so through an amendment that read: "[A]n alien is not deportable by reason of committing any offense that was not a ground of deportability on the date the offense occurred."[169]

Other approaches to assisting the non-removable alien are more general. There is a need to raise awareness within immigrant communities of the dire consequences that follow criminal conduct, especially if one is stateless or from particular nations. Another positive step involves a call to the legal profession to provide the nation's immigrant population with more and better legal advice and representation. Alien detainees are not provided government-appointed representation in deportation hearings or detention reviews.[170] To make matters worse, detained aliens are often moved from facility to facility in what some describe as "seemingly arbitrary ways" that make maintaining family connections and legal representation very difficult.[171] It is estimated that at least one-third of aliens did not have legal representation at their deportation hearings.[172] The ABA reports that aliens "who appear before an immigration judge without

166. Tebo, *supra* note 11, at 51. Presumably, however, refugees and asylum-seekers would not be turned away.

167. *Id.* at 46.

168. *Id.*

169. H.R. 4966, 106th Cong., § 207 (1999).

170. *See* NPR, *supra* note 39.

171. Tebo, *supra* note 11, at 48.

172. *Id.* at 46.

a lawyer are five times more likely to be deported."[173] This is an injustice that should be addressed through more pro bono work and better legal assistance programs.

Finally, the problem of indefinite detention of deportable, criminal aliens is not only a matter for the INS and immigration courts. The role that our criminal justice system can play in balancing all interests involved should also be considered in future legislative enactments. State or federal judges, if required through federal legislation to consider the dire consequences an alien faces when a conviction of a certain number of years is entered, may wish to take into account the likelihood that an alien will be non-removable when making sentencing decisions. More important, a shift in the perceived purpose of the criminal justice system away from punishment and toward rehabilitation would address one of the most important public policy concerns involved: future dangerousness.

IX. CONCLUSION

The numerous competing public policy concerns regarding what is to be done with non-removable, criminal aliens certainly cannot all be resolved in one judicial determination, such as *Zadvydas II*. Efforts that meet those concerns will be necessary on many levels, including through legislation, INS procedure, and diplomatic efforts. In the meantime, it is important not to forget what is at issue: the liberty interest of thousands of individuals. Changes in the treatment of aliens by the United States over the years reflect an on-going balancing act our nation must continue to conduct between individual rights and national interests. In the wake of the September 11 terrorist attacks on America, it is important not to forget the benefits that immigration has brought to the United States.

Finally, it is important to remember that many immigrants, including criminal aliens, have established connections to the United States that are much stronger than any they may retain with their former nations. These aliens have families, usually some of whom are American citizens, whose own lives are greatly affected by the immigration laws that Congress enacts and the INS enforces. Even if one has little sympathy for a criminal alien who has "blown his chance," it must not be forgotten that the continued detention of such aliens has international, domestic, and humanitarian consequences that must be addressed.

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173. *Id.*