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Deciding the Issue of the Legality of Indefinite Detention of Inadmissible Aliens One Year After *Zadvydas v. Davis*: The Ninth Circuit Broadens the Rights Afforded to Individuals Not Legally Admitted to the United States *XI v. INS*, 298 F.3d 832 (9th Cir. 2002)

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**DECIDING THE ISSUE OF THE LEGALITY OF
INDEFINITE DETENTION OF INADMISSIBLE
ALIENS ONE YEAR AFTER ZADVYDAS V. DAVIS:
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AFFORDED TO INDIVIDUALS NOT LEGALLY
ADMITTED TO THE UNITED STATES
XI V. INS, 298 F.3D 832
(9TH CIR. 2002)**

I. INTRODUCTION

In 2001 the Supreme Court decided the issue of the legality of indefinite detention of deportable¹ aliens in the landmark case of *Zadvydas v. Davis*.² The court held indefinite government detention³ of deportable

1. “Deportable” aliens are aliens who the government has already admitted to the United States and subsequently wishes to remove. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 7 (3d ed. 2002). Established grounds for “deportability” reflect a range of national concerns, including economics, health, morality, politics, and national security. *Id. See, e.g.,* United States v. Parrino, 212 F.2d 919, 919 (2d Cir. 1954) (holding that a defendant who pled guilty and was convicted of a charge of conspiracy to kidnap was deemed deportable). In addition, separate deportability grounds ensure “the integrity of the immigration inspection system itself.” LEGOMSKY, *supra* at 6. (stating that filing a fraudulent application to become a Legal Permanent Resident, or “LPR” is grounds for deportation later). The deportability grounds are accompanied by a system of statutory provisions that authorize the government to make discretionary waivers of specified deportability grounds under certain circumstances. *Id.* The vast majority of deportable citizens are removed through an informal measure known as “voluntary departure.” *Id.* Nonetheless, the courts may hold many formal removal hearings. *Id.* The INS initiates the proceedings and presents a case before an immigration judge. *Id.* The judge then determines whether the individual is deportable, and if so, whether he or she is eligible for some kind of discretionary relief, such as asylum. *Id.* Once the judge renders a decision, the alien or the INS may appeal the decision to the Board of Immigration Appeals (BIA). *Id.* In addition, the alien may also obtain judicial review of the BIA decision by the appropriate appellate court in that jurisdiction. *Id.*

2. 533 U.S. 678 (2001). The Supreme Court combined the cases of *Zadvydas* and *Kim Ho Ma*, both long-time resident aliens of the United States who had been convicted of various crimes. *Id.* at 686. The court sentenced *Zadvydas* to sixteen years in prison for possession of cocaine; however, he was released after serving two years. *Id.* at 684. In 1994 the INS again took him into custody and attempted to deport *Zadvydas* to Germany where he was born. *Id.* Germany refused to accept *Zadvydas*, as did Lithuania based on lack of citizenship. *Id.* The Dominican Republic, where his wife maintained citizenship, also refused to accept him. *Id.* The INS kept *Zadvydas* in detention after the expiration of the 90-day statutory removal period. *Id.* *Zadvydas* subsequently filed a writ of habeas corpus challenging his confinement under 28 U.S.C. § 2241. *Id.* at 684-85. Two years later, a federal district court granted the writ, ordering that *Zadvydas* be released under supervision, holding that the detention of *Zadvydas* when deportation was no longer imminent permanent, unconstitutional confinement. *Id.* at 685. *See also* *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1027-28 (E.D. La. 1997). The Fifth Circuit subsequently reversed, finding that the deportation of *Zadvydas* was not

aliens violated existing immigration law.⁴ Roughly a year later, in *Xi v. INS*,⁵ the ninth Circuit Court of Appeals expanded the scope of the Supreme Court's holding to apply to another class of removable aliens: those deemed inadmissible.⁶ *Xi* is an important milestone in the area of immigration law, by broadening the rights accorded to removable aliens.

"impossible." *Id.* The court found that the government was engaged in good faith efforts to deport Zadvydas, and further noted that his detention was periodically subject to review. *Id.* See also *Zadvydas v. Underdown*, 185 F.3d 279, 291-97 (5th Cir. 1999). For a good overview of the case, see Tara Manger, Recent Development, *Developments in the Judicial Branch: The Government May Not Detain an Alien Indefinitely Because No Other Country is Willing to Accept Him: Zadvydas v. Davis*, 533 U.S. 678 (2001), 15 GEO. IMMIGR. L.J. 759, 760 (2001).

3. When the INS determines that an alien is present in the United States unlawfully, a final order of removal is entered. See 8 U.S.C. § 1229a (2003). The Government will then arrange for the alien's physical removal within the ninety day statutory "removal period." 8 U.S.C. § 1231(1)(A) (2002). Under certain circumstances, however, such as a determination that the alien violated criminal laws and/or may be a "risk to the community," the INS may detain an individual beyond the ninety-day period. See *infra* note 22 for text of applicable provisions of 8 U.S.C. § 1231 (2002). The *Zadvydas* holding is directed toward those individuals who remained in detention beyond the established statutory period. See Manger, *supra* note 2, at 760. In *Zadvydas*, the Court held that such detainees could be held in detention only for a reasonable period. *Zadvydas*, 533 U.S. at 680, 701. In construing the statute, the Court sought to establish a "uniform administration in the federal courts" while discerning Congressional intent. *Id.* The Court established that six months constituted a reasonable period of detention, after which period the Government is mandated to consider the possibility of release and appropriate conditions. *Id.* Even after the established six month period has expired, however, continued detention of the alien is permissible if the Government can demonstrate that his or her removal is reasonably foreseeable. *Id.* The alien has the burden to provide "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* The burden then shifts to the Government to "respond with evidence sufficient to rebut [the detainee's] showing." *Id.*

4. *Id.* at 691.

5. 298 F.3d 832 (9th Cir. 2002).

6. "Inadmissible" aliens, (formerly called "excludable" aliens prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L.No. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1251(d)(2-3) (2002)), are individuals seeking admission to the United States who fall within one of the criteria for inadmissibility detailed in Section 212(a) of the Immigration and Nationality Act (INA), Pub.L. 82-414, 66 Stat. 163 (June 27, 1952). Aliens fitting into one or more of the classes listed in this section are "ineligible to receive visas and ineligible to be admitted to the United States." INA § 212(a). Under the new regulations implemented by IIRIRA, an alien may be deemed inadmissible under any one of ten grounds. These grounds include: health-related grounds; criminal and related grounds; security and related grounds; public charge proscription; labor certification requirements and qualifications for certain immigrants; illegal entrants and immigration violators proscription; documentation requirements; ineligibility for citizenship; aliens unlawfully present; and miscellaneous. IIRIRA served to broaden the grounds for inadmissibility. See, e.g., *Abourezk v. Reagan* 785 F.2d 1058, 1059, 1043, 1058, 1059 (D.C. Cir. 1986) (holding government's decision that an anarchist or a Communist party member is inadmissible must be based on projected engagement in activities prejudicial to the public interest, and such perception must be independent of the fact that the individual is a member of the organization). Under the new regulations, bar new categories of immigrants, including immigrants who cannot document that they have been vaccination against vaccine-preventable diseases and former U.S. citizens who renounced citizenship to avoid taxation. See DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL § 9-1 (4th ed. 1998).

This Recent Development analyzes *Xi* by examining the Ninth Circuit's majority and dissenting opinions and addressing the legal and policy implications of this case. Section II details the facts and procedural history of *Xi*. Section III(a) provides a comprehensive analysis of the statute addressing the detention and removal of aliens ordered removed and the landmark Supreme Court case of *Zadvydas v. Davis*, which provided the basis for the Ninth Circuit's decision in *Xi*. Section III(b) discusses the majority's holding in *Xi*. Section III(c) addresses the dissent's legal arguments. Section III(d) addresses the foreign policy concerns which the dissent raises. Section IV offers a legal analysis of the implications of *Xi* in construing the USA PATRIOT Act. Finally, Section V provides an analysis of the likely international impact of *Xi*.

In Section VI this Recent Development concludes that due to the careful construction of court's opinion, which provides for continued detention in cases involving national emergency, a legal challenge to the provisions of the USA PATRIOT Act is not likely to succeed. This Recent Development also concludes that should the Ninth Circuit's holding be upheld by the Supreme Court, it will significantly impair the government's ability to restrict immigration and may have a deleterious effect upon the strength of our nation's foreign policy. In addition, this Recent Development asserts that future decisions may follow the Ninth Circuit's holding in *Xi* and broaden the rights afforded to inadmissible aliens.

II. FACTS AND PROCEDURAL HISTORY

Lin Guo Xi, a Chinese national, fled his homeland for the Northern Mariana Islands in June, 1997.⁷ The United States Coast Guard thwarted Lin's plans for escape, when it arrested Lin off the coast of Guam after discovering him aboard a boat that was being used to smuggle aliens in violation of United States immigration laws. Lin pleaded guilty to the charge of smuggling, and was subsequently convicted.⁸ After completing a six-month prison sentence, INS detained Lin pending the outcome of removal proceedings.⁹

Once within United States borders, Lin applied for asylum based on his opposition to China's family planning laws.¹⁰ An immigration judge found

7. *Xi*, 298 F.3d at 832.

8. *Id.*

9. *Id.*

10. *Id.* The Chinese government discourages couples from having more than one child by imposing a hefty economic penalty couples with larger families. See *Yong Hao Chen v. INS*, 195 F.3d 198, 200-04 (4th Cir. 1999). In addition, forced sterilizations and abortions have been reported in the

Lin's argument unpersuasive, denied Lin's claim, and issued a removal order.¹¹ It is disputed as to the number of times that the INS attempted to secure travel documents for Lin's return to China and the number of times he refused to cooperate. It is indisputable, however, that in February 2001, Lin finally agreed to cooperate with the INS in obtaining the proper travel documents.¹²

Upon initial review of Lin's detention status in February 2001, the INS learned that Xi had a place to stay and employment prospects in Washington State.¹³ Nevertheless, the reviewing officer decided to keep Lin in detention. Lin filed a habeas corpus petition¹⁴ pursuant to 28 U.S.C. § 2241.¹⁵ Ten days before the Supreme Court's decision in *Zadvydas v. Davis*,¹⁶ holding that indefinite detention of *deportable* aliens was illegal, the district court denied Lin's petition.¹⁷ In light of *Zadvydas*, Lin filed a motion for reconsideration.¹⁸ The district court denied the motion for reconsideration,¹⁹ relying upon the entry fiction doctrine because Lin was

rural areas of that country. *Id.* at 201. Over the years, some Chinese nationals have argued successfully that the Chinese family planning laws constitute persecuted them; the government granted the affected individuals asylum. Under INA § 101(a)(42), any forced abortion or sterilization, or persecution for failure or refusal to submit to abortion or sterilization, constitutes persecution on account of political opinion. Recent case law addressing the INA provision has established that the alien must demonstrate that such fear is well founded. *See id.* at 200-04 (noting that the State Department had asserted that forced sterilizations and abortions had become less frequent in China, that they occur mainly in rural areas, and that they are especially unlikely to affect people (like the couple seeking asylum) who bear children while attending school in the United States and then return home). As a result, the court held that the burden is on the applicant to provide evidence that the State Department is wrong or that he or she has a particular reason to fear coerced sterilization or abortion. *Id.* *See* LEGOMSKY, *supra* note 1, at 892-93.

11. *Xi*, 298 F.3d at 833.

12. *Id.* At the time the 9th Circuit issued this opinion, a request for travel documents had been submitted to the Chinese consulate, which had not yet responded. *Id.* The United States government asserted that the Chinese government accepts the return of its nationals who have been ordered removed from the United States; Lin maintained that the Chinese government did not accept the returnees. *Id.*

13. *Id.*

14. According to Black's Law Dictionary, *habeas corpus* is defined as follows:

A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal. . . In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain review of (1) the regularity of extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence.

BLACK'S LAW DICTIONARY 569 (7th ed. 2000).

15. *Xi*, 298 F.3d at 833. Lin filed his habeas petition under 28 U.S.C. § 2241. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

never lawfully admitted to the United States.”²⁰ In essence, the court reasoned that although Lin was technically living within United States borders as an inadmissible alien he was not entitled to the same rights and privileges accorded to aliens living here legally. At the time of the appellate review, Lin remained in detention.²¹

III. ANALYSIS

A. Indefinite Detention of Deportable Aliens

In holding that indefinite detention of inadmissible aliens is illegal, the *Xi* court focused primarily on the federal statute that provides the groundwork for the detention and removal of aliens ordered removed, 8 U.S.C. § 1231(a)(6).²²

The court attached significant weight to the Supreme Court’s interpretation of Section 1231 as applied to deportable aliens in *Zadvydas*

20. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), the Court held that “an alien on the threshold of initial entry stands on a different footing” with regard to due process rights. *Id.* at 206, 212. According to the 9th Circuit Court of Appeals in *Xi v. INS*, 298 F.3d at 834,

In *Mezei* the Court created an ‘entry fiction’ which extended this distinction to some individuals within the United States but who, as a result of their status, are deemed technically to be outside. Under an earlier version of the INA, we interpreted this fiction to authorize the courts to treat an alien in exclusion proceedings as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States.

Xi, 298 F.3d at 834.

21. *Id.* The INS relied upon 8 U.S.C. § 1231(a)(6) for authority to detain Lin. *Id.* See *infra* note 22 for the full text of this provision.

22. 8 U.S.C. § 1231(a)(6) (2002). The applicable statute, entitled *Inadmissible or criminal aliens*, reads as follows:

An alien ordered removed who is inadmissible under section 212 [8 U.S.C.A. § 1182], removable under section 237(a)(1)(C) . . . [8 U.S.C.A. § 1227(a)(4)] . . . or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

8 U.S.C. § 1231(a)(3) (2002), to which this statute refers, is entitled *Supervision after 90-day period*. The text of paragraph (3) of § 1231(a) reads as follows:

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien to appear before an immigration officer periodically for identification; to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government; to give information under oath about the alien’s nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and to obey reasonable written restrictions on the alien’s conduct or activities that the Attorney General prescribes for the alien.

8 U.S.C. § 1231(a)(3) (2002).

v. Davis.²³ In *Zadvydas*, the Supreme Court focused on the provisions in Section 1231²⁴ which permitted the detention of deportable aliens beyond the ninety day statutory “removal period”²⁵ if they have violated criminal laws or have “been determined . . . to be a risk to the community.”²⁶

Zadvydas, was held deportable after being convicted of several crimes,²⁷ and held beyond the 90-day statutory period after the INS encountered difficulty in successfully deporting him.²⁸ In its defense, the INS asserted that the Attorney General had the discretion to determine the length of *Zadvydas*’ detention.²⁹ The Supreme Court held that federal habeas corpus law³⁰ vests jurisdiction over such matters exclusively within the federal court system.³¹ The Court found no indication that the legislature intended for the Attorney General to retain exclusive control over such matters.³²

Zadvydas held that the United States Constitution does not allow for indefinite detention of aliens when deportation is “no longer reasonably foreseeable.”³³ In support of its holding, the Court noted that the Fifth Amendment’s Due Process Clause³⁴ applies equally to all persons within the United States, regardless of “lawful, unlawful, temporary, or

23. *Xi*, 298 F.3d at 835-39.

24. 8 U.S.C. § 1231 (2002).

25. *See supra* notes 3 and 22.

26. *Zadvydas*, 533 U.S. at 688. *See also* 8 U.S.C. § 1231(a)(6).

27. *Zadvydas*, 533 U.S. at 684. The court convicted *Zadvydas* of several crimes, including possession, with intent to distribute, of cocaine, theft, and attempted burglary. After his most recent conviction, the court sentenced *Zadvydas* to 16 years’ imprisonment; he was paroled after two years. The INS took him into custody after his release. *Id.*

28. *See supra* note 2.

29. *Zadvydas*, 533 U.S. at 687-89.

30. *Id.* The primary habeas corpus statute, 28 U.S.C § 2241, allows any person to claim in federal court that he or she is being held “in custody in violation of the Constitution or laws . . . of the United States.” 28 U.S.C. § 2241(c)(3).

31. *Zadvydas*, 533 U.S. at 687. The Court noted that the primary habeas corpus statute confers jurisdiction upon federal courts to hear those types of cases. *See supra* note 1. In finding that habeas corpus cases even in immigration matters, remained the domain of federal courts, the court chronicled the history of judicial review of challenges to deportation orders. *Id.* at 687.

32. *Id.* at 687-88. The Court reviewed several recently enacted statutes which limited the circumstances in which judicial review of deportation decisions is available, but decided that none of those provisions were applicable in *Zadvydas*’s circumstances. Most significantly, 8 U.S.C. § 1252(a)(B)(ii) (1994), provides that “no court shall have jurisdiction to review” decisions “specified . . . to be in the discretion of the Attorney General.” *Id.* at 688. The Court determined that *Zadvydas* did not request a review of the Attorney General’s exercise of discretion; but instead challenged the Attorney General’s authority under the post-removal-period statute. *Id.* The Court maintained that the scope of authority of the Attorney General was not a matter of the Attorney General’s discretion. *Id.*

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

34. U.S. CONST. amend. V.

permanent status.”³⁵ The deportation statute, 8 U.S.C. § 1231, also states that detention is limited to “a period reasonably necessary to bring about that alien’s removal from the United States.”³⁶

With respect to the “reasonable time” limitation, the Court determined that detention in excess of six months was constitutionally objectionable.³⁷ In arriving at this figure, the Court reviewed the legislative history from the time of the creation of the statute.³⁸ According to the Court, the legally correct course of action to the expiration of the “reasonable time” period of detention is to first determine if the alien can provide “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.”³⁹ The government bears the burden of rebutting the alien’s showing with sufficient evidence to the contrary.⁴⁰ If it is determined that the alien’s deportation is not reasonably foreseeable,⁴¹ the government must release the detainee subject to strict conditions rather than fully discharging the detainee into the community.⁴² Underscoring this point, the Court noted that “the choice . . . is not between imprisonment and the alien detainee ‘living at large. . . . It is between imprisonment and supervision under release conditions that may not be violated.”⁴³

Even if a court determines that deportation is in fact foreseeable, certain factors, such as the alien’s potential danger to the community at large,⁴⁴ may still warrant that individual’s continued detention beyond the

35. *Zadvydas*, 533 U.S. at 693.

36. *Id.* at 701. *See supra* note 22, for the full text of 8 U.S.C. § 1231(a)(6).

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

38. *Id.* The Court reasoned that in this case it had to discern Congressional intent and determine a presumptively reasonable detention period. *Id.* at 696-97. To that end, the Court looked to legislative history surrounding the inception of the statute. *Id.* at 696-702. In the 1996 immigration laws (IIRIRA), Congress shortened the removal period to ninety days. *Id.* at 701. The Court found it difficult to believe that Congress thought all removals could be accomplished within that amount of time. *Id.* However, some evidence also suggested that prior to the enactment of the statute, Congress had doubted the constitutionality of detention in excess of six months. *Id.* (citing *Juris*, Statement of United States in *United States v. Witkovich*, O.T. 1956, No. 295, pp.8-9).

39. *Id.* at 701.

40. *Id.*

41. *Id.* at 699.

42. *Id.* *See supra* note 25 and accompanying text for a description of possible restrictions on an alien released pursuant to 8 U.S.C. § 1231(a)(6).

43. *Id.* at 696. Under 8 U.S.C. § 1253, there are penalties for failure to comply with release conditions. 8 U.S.C. § 1253 (2002).

44. *Id.* at 700. Penalties may be imposed for violations of conditions of release. 8 U.S.C. § 1231(a)(3).

six months “reasonable time” limitation.⁴⁵ Absent these factors, however, continued detention is an unconstitutional due process violation.⁴⁶

B. Xi Majority: Inadmissible Aliens Fall Under the Standard Articulated in Zadvydas

In *Xi v. INS*,⁴⁷ The Ninth Circuit chose to extend the reach of *Zadvydas* to inadmissible aliens.⁴⁸ The majority held that although the United States never legally admitted Lin nonetheless fell “squarely within the ambit of 8 U.S.C. § 1231(a)(6) and, consequently, within the Supreme Court’s holding in *Zadvydas*.”⁴⁹

The Ninth Circuit reasoned that the statute did not distinguish among the various classes of aliens.⁵⁰ Thus, the court held that inadmissible aliens would be summarily treated as deportable aliens for purposes of interpreting the statute.⁵¹ According to the Ninth Circuit, *Zadvydas* applied equally to both classes of aliens.⁵²

Despite arguments raised by the dissent’s argument that deportable aliens are generally afforded higher status than inadmissible aliens in the eyes of the law, the majority reasoned that the Supreme Court’s categorical interpretation of the statute in *Zadvydas* gave them little choice but to apply the holding to *Xi*.⁵³ According to the majority, the statute’s

45. *Id.* at 690-91. The Court maintained that preventive detention to protect the community was only justified in cases of extreme dangerousness, subject to strong procedural protections. For guidance, the Court looked to two cases. *United States v. Salerno*, 481 U.S. 739 (1987), upheld preventative pretrial detention, stressing “stringent time limitations,” limited application to “the most serious of crimes” subject to proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards). *Id.* at 747, 750. In *Foucha v. Louisiana*, 504 U.S. 71 (1992) the court struck down insanity-related detention system that required the detainee to prove nondangerousness. *Id.* at 81-83.

46. *Id.*

47. 298 F.3d 832 (9th Cir. 2002).

48. *Id.* at 836. The *Zadvydas* majority stated that, “In our view, the statute, read in light of the Constitution’s demands, limits an alien’s post-removal period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.” *Id.* (quoting *Zadvydas*, 533 U.S. at 689).

49. *Id.* at 833-34. In *Zadvydas*, the Court held that 8 U.S.C. § 1231(a)(6) did not permit the indefinite detention of two long-time resident aliens when the court ordered removed to countries that would not accept them following the commission of crimes. *Id.* (construing *Zadvydas*, 533 U.S. at 684-86). See also *supra* notes 22-45 and accompanying text.

50. *Id.* at 835.

51. *Id.* at 836. The court noted that “[t]he clear text of the statute, coupled with the Supreme Court’s categorical interpretation, leaves us little choice but to conclude that *Zadvydas* applies to inadmissible individuals like Lin.” *Id.* at 836.

52. *Id.* The court stated that “The statute, on its face, makes no exceptions for inadmissible aliens.” *Id.*

53. *Id.*

language did not provide for a bifurcated construction, affording different rights to different categories of aliens.⁵⁴

C. Dissent: Zadvydas is Inapplicable in Cases Involving Inadmissible Aliens

In her dissenting opinion, Judge Pamela Ann Rymer articulated her belief that the in the majority improperly applied the *Zadvydas* holding in *Xi*.⁵⁵ Judge Rymer's chief argument was that the Court's interpretation of 8 U.S.C. § 1231(a)(6)⁵⁶ in *Zadvydas* applied only to aliens deemed *deportable*.⁵⁷ Lin Guo Xi was classified as an *inadmissible* alien as opposed to a *deportable* alien.⁵⁸

Judge Rymer relied upon language in the *Zadvydas* opinion indicating that indefinite detention of deportable aliens was unlawfully violated the Due Process Clause, which applies "to all persons 'within the United States' regardless of lawful presence."⁵⁹ Rymer asserted that since inadmissible aliens like Lin did not reside within the borders of the United States, they were not entitled to the same constitutional protection as

54. *Id.* at 836-37. The court looked to the language of Justice Kennedy's dissent in *Zadvydas*. Justice Kennedy noted that bifurcated construction was untenable. He stated that: "the majority's logic might be that inadmissible aliens can be treated differently. Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class [deportable aliens] but not to another [inadmissible aliens] The text does not admit this possibility." *Id.* at 836 (quoting *Zadvydas*, 533 U.S. at 710 (Kennedy, J. dissenting)).

55. *See* 298 F.3d at 840-43.

56. 8 U.S.C. § 1231 (a)(6) (2002). *See supra* note 22, for the full text of this provision.

57. 298 F.3d at 840-43.

58. *Id.* at 835. "Deportable" aliens are noncitizens who have been admitted to the United States, but whom the government wishes to remove for any number of concerns, including national security or fraud in the initial application for admission. *See supra* note 1. "Inadmissible" aliens, on the other hand, are noncitizens who are seeking to be admitted to the United States and fall under one of the statutory grounds for inadmissibility, such as a history of past criminal conduct or potential to become a public charge. *See supra* note 1 and accompanying text.

59. 298 F.3d at 841 (quoting *Zadvydas*, 533 U.S. at 693). Essentially, the Court held that those individuals residing within United States borders, both citizens and LPR's, are allotted certain rights under the constitution. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365 (2002). Regarding deportable aliens and constitutional rights, Aleinikoff summarized Justice Breyer's opinion as follows:

"Justice Breyer's answer appears to be that because the non-citizen detainees had entered the United States, they benefit from the usual panoply of constitutional rights granted to citizens and non-citizens alike, including the right to be free from arbitrary detention. Thus, immigrant status alone cannot provide the 'something more' necessary to justify indefinite detention . . . [T]o be sure, non-citizens inside the United States are afforded most of the constitutional protections that citizens enjoy."

Id. at 370.

aliens living within the United States.⁶⁰

Rymer pointed to the Supreme Court's holding in *Shaughnessy v. Mezei*⁶¹ that the U.S. government may detain an excludable alien indefinitely if his country origin refuses to re-accept him.⁶² The *Zadvydas* majority held that *Mezei* did not apply in the case of admitted aliens due to constitutional concerns about aliens residing within the borders of the United States.⁶³ Rymer asserted that, in light of *Zadvydas*, while indefinite detention of aliens already admitted to the United States and later deemed deportable was in fact not permissible, aliens who had not yet been admitted remained unaffected by the Supreme Court decision.⁶⁴

In bolstering her argument, Judge Rymer quoted language from *Zadvydas* that suggested the Court intended to limit the holding to deportable aliens.⁶⁵ According to the Court, inadmissible aliens “present a very different question” and being inadmissible “made all the difference.”⁶⁶ According to Rymer, the Court construed the statute in a manner that guaranteed Due Process to deportable aliens in an effort to ensure that the statute would not be rendered “categorically infirm.”⁶⁷ In Rymer's opinion, the *Zadvydas* Court issued a narrow holding in order to protect the rights of aliens already admitted to the United States.⁶⁸

In addition, Judge Rymer asserted that existing caselaw directly contradicted the majority's holding. For example, Rymer referred to *Barrera-Echavarria v. Rison*,⁶⁹ in which the Ninth Circuit held that excludable aliens who could not be returned to their country of origin could be detained at the discretion of the Attorney General.⁷⁰

60. 298 F.3d at 840-43.

61. 345 U.S. 206 (1953). See *supra* note 20 and accompanying text.

62. *Xi*, 298 F.3d at 841.

63. *Zadvydas*, 533 U.S. at 693. According to the Court, “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.*

64. *Xi*, 298 F.3d at 840.

65. *Id.* According to Rymer:

The Court's interpretation was discrete to *admitted* aliens. It was driven by the need to avoid constitutional problems that pertain to those who are admitted—but that do not pertain to those who are *not* admitted. By invoking the constitutional avoidance doctrine, the Court was trying to effectuate legislative intent yet assure constitutional application to *admitted* aliens.

Id. at 841.

66. *Id.* (quoting *Zadvydas*, 533 U.S. at 693).

67. *Id.* According to Rymer, “When a statute has different applications, it is not necessary to say that it is categorically infirm; it is only the constitutionally problematic aspects which are subject to the construction that avoids the problem.” *Id.*

68. *Id.* at 693.

69. 44 F.3d 1441 (9th Cir. 1995) (en banc).

70. *Xi*, 298 F.3d at 842-43. See also 44 F.3d at 1448. The court held that:

The majority discounted *Barrera-Echavarria*, maintaining that its holding was no longer viable in light of the implementation of the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA),⁷¹ which changed the wording of the statute's language and renamed "excludable" aliens as "inadmissible" aliens.⁷² The statute replaced the term "entry" with the term "admission,"⁷³ redefined as "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer."⁷⁴

In defense of her argument, Rymer asserted that while the *Barrera-Echavarria*'s statutory analysis may not be relevant given the changes implanted by IIRIRA, the rationale behind its holding was still valid.⁷⁵ In fact, although IIRIRA altered the statutory language, IIRIRA effectively tightened, rather than loosened, the removal procedures.⁷⁶ In distinguishing *Mezei* in the *Zadvydas* opinion, the Supreme Court reasoned that *Mezei*'s excludable status "made all the difference."⁷⁷ In essence, the Supreme Court disregarded its holding in *Mezei* because *Zadvydas* was an alien who was already residing in the United States and had not been admitted. In this regard, Rymer asserts that the Supreme Court disallowed indefinite detention of *Zadvydas* precisely because he was deportable, not inadmissible (or excludable).⁷⁸ Under that analysis, Lin's status as an inadmissible alien should have placed him squarely outside of the scope of the Court's holding in *Zadvydas*.⁷⁹

Reading a time limit on detention into § 1227 [which provided for immediate deportation of excludable aliens unless the Attorney General concludes that it is not practicable or proper] would risk frustrating the government's ability to control immigration policy and relations with foreign nations. A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in negotiations over the Mariel refugees.

Id. See *infra* note 89, for a description of the Mariel boatlift referenced by Judge Rymer.

71. Illegal Immigration Reform and Immigrant Responsibility Act of 1996(IIRIRA), *supra* note 6.

72. See *supra* note 6. Compare 8 U.S.C. §§ 1101(a)(13), 1182 (1994) with 8 U.S.C. §§ 1101(a)(13)(A), 1182 (2002).

73. See 8 U.S.C. § 1101(a)(B)(A), 1182 (2002).

74. *Id.*

75. See *Xi*, 298 F.3d at 842-43.

76. *Id.*

77. *Zadvydas*, 533 U.S. 678 (2001).

78. *Xi*, 298 F.3d at 841.

79. 533 U.S. 678 (2001).

D. Dissent: Policy Criticism of the Majority's Holding and Potential Repercussions of Xi v. INS

In her dissenting opinion, Judge Rymer maintained that the majority's holding would prove to have a deleterious effect upon the government's ability to control immigration policy and foreign relations.⁸⁰ Practically speaking, the majority's holding, according to Rymer, would leave an "unprotected spot in the Nation's armor,"⁸¹ reducing the power of the Attorney General and allowing individuals who should never have gained admission to the United States to be released into society.

In particular, Rymer asserted that a policy permitting the eventual release of inadmissible aliens into American society would encourage leaders of countries such as Cuba to compel the United States to grant physical admission via parole to any individuals those countries wished by simply sending them to the United States and then refusing to take them back.⁸² In cases with sensitive foreign policy implications, such as those relating to Cuba, such a result would be contrary to the U.S. interests.

IV. THE LEGACY OF *Xi v. INS*: INDEFINITE DETENTION OF INADMISSIBLE ALIENS AND THE USA PATRIOT ACT⁸³

Xi marks an extremely important development in immigration law, by extending the holding of *Zadvydas* to a class of noncitizens previously unprotected under the constitution.

Should *Xi* be upheld by the Supreme Court, such a decision will likely provide further ammunition for challengers of the newly enacted USA PATRIOT Act.⁸⁴ The well publicized provisions of the Act provide the Attorney General authority to essentially do the very thing disallowed under both this case and *Zadvydas*: detain aliens suspected of terrorist

80. *Xi*, 298 F.3d at 841.

81. *Id.* (quoting *Zadvydas*, 533 U.S. at 695-96).

82. *Id.* (quoting *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985)). In *Nelson* the Eleventh Circuit held that "[T]his approach would ultimately result in our losing control of our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back." *Id.*

83. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered Titles of the U.S.C.). See also Jonathan Krim & Robert O'Harrow, Jr., *Bush Signs into Law New Enforcement Era; U.S. Gets Broad Electronic Powers*, WASH. POST, Oct. 27, 2001, at A6.

84. See *infra* note 92.

activity free from the legal constraints of the Due Process Clause.⁸⁵ In light of the September 11, 2001 terrorist attacks, the legislature has seen fit to enact a statute that allows the government to detain foreign nationals suspected of engaging in terrorist activity more easily.⁸⁶ Among those arrested since the enactment of the statute include aliens already residing in the United States as well as those who have not successfully gained legal entry.⁸⁷

On the surface, it seems clear that the *Zadvydas* decision, which predated the PATRIOT Act by several months, could provide a strong basis for the argument that indefinite detention of deportable aliens for any reason is illegal. However, Justice Breyer's opinion contains an important caveat: "special arguments might be made for forms of preventive detention" in situations involving national security or "other special circumstances."⁸⁸ Thus, *Zadvydas* does not affect the Attorney General's power to protect national security. It is generally accepted that the very real possibility of further terrorist attacks constitutes the situation involving "national security" suggested in *Zadvydas*. In an April 17, 2003 Department of Justice opinion requested by the new Homeland Security Department Attorney General John Ashcroft recently re-asserted the right of the Government to indefinitely detain illegal immigrants whose cases pose national security concerns in wake of the September 11, 2001 terrorist attacks.⁸⁹

85. For information about the history of the Due Process Clause and modern arguments concerning its substantive aspects, see GERALD GUNTER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 432-54 (13th ed. 1997). The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. The clause has ancient origins in Anglo-American law, which protected free men from government acts unless in accord with the "law of the land." GUNTER & SULLIVAN, *supra*, at 433. Historically Americans have treated this guarantee as both procedural and substantive, although its substantive aspects are among the most controversial issues in constitutional law. *Id.* at 432-33.

86. See Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002). According to Germain, the new legislation "specifically allows for the Attorney General to continue to detain a non-citizen 'irrespective of . . . any relief from removal granted that alien.'" It is, therefore, not only conceivable, but quite possible that individuals granted asylum could be detained indefinitely if the provisions of this new section are applied." *Id.* at 524.

87. Such individuals included those who engaged in terrorist activity, and the threat, attempt, or conspiracy activities. In addition, the Act applied to members of foreign terrorist organizations. *Id.* at 518. A complete analysis of the USA PATRIOT Act is beyond the scope of this article. For a good overview, see Jonathan Lancaster, *House Approves Terrorism Measure; Bill Grants Bulk of Bush's Request*, WASH. POST, Oct. 25, 2001, at A1.

88. *Zadvydas*, 533 U.S. at 696.

89. See *In re D-J-*, 23 I&N Dec. 572 (A.G. 2003 (2003 WL 1953603)). In an administrative opinion regarding the case of a Hatian asylum-seeker, Attorney General John Ashcroft concluded that aliens may not be released on bond while their cases are being decided by immigration judges if the

Challenges to the legislation utilizing *Zadvydas* have been generally unsuccessful.⁹⁰ This is in large part due to the fact that Congress actually partially adopted *Zadvydas*'s holding in the PATRIOT Act; the Act requires the government to release certain removable aliens after six months.⁹¹ As implied in *Zadvydas*, the Attorney General may deny such relief if the alien is found to be a danger to the community or to any person.⁹² The post-*Zadvydas* Act, therefore, returns some discretion to the Attorney General.⁹³ This discretion is limited, however, to a narrow class of aliens with some connection to national security or terrorism concerns.⁹⁴ While Congress certainly indicated support for reasonableness limitations and for the six-month presumptively reasonable period,⁹⁵ Congress also stressed its concern for community safety in implementing this legislation.⁹⁶

The Ninth Circuit carefully avoided the PATRIOT Act issue in *Xi*, noting that the court wished to "express no view on the legislation but note

Government can show that national security issues are implicated. *Id.* at 572. The Attorney General issued the opinion upon request from the Homeland Security Department after the Board of Immigration Appeals upheld a judge's decision to release Hatian asylum-seeker David Joseph on a \$2,500 bond. *Id.* at 573. The Government asserted that the release of Hatian refugees on bond could compromise national security if the release triggered a huge wave of immigrants to attempt to reach U.S. shores. *Id.* at 577. According to the Government, could potentially divert the efforts of governmental agencies that are busy trying to thwart terror attacks. *Id.* In his administrative opinion, Attorney General John Ashcroft reasserted the Attorney General's "broad discretion" in determining the status of potential immigrants. *Id.* at 572.

90. See *Padilla ex rel. v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002). This case involved an LPR alleged to be a combatant associated with the al Qaeda terrorist network. The court noted the *Zadvydas*, Court "was careful to point out that the case did not involve 'terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.'" *Id.* at 591 (construing *Zadvydas*, 533 U.S. at 696).

91. USA PATRIOT Act, *supra* note 83, § 412 (to be codified at 8 U.S.C. § 1226(a)).

92. See Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills, 78 No. 39 Interrel Releases 1591, 1592-93 (Oct. 8, 2001) (explaining that the provision comports with the presumptive period, but allows the Attorney General to consider whether an alien is dangerous to the community or any individual).

93. USA PATRIOT Act, *supra* note 83, § 412 (to be codified at 8 U.S.C. § 1226(a)).

94. *Id.* at 1226A(a)(3) (listing the classes of aliens affected by the Act). See also Rob Reckers, Note, *The Future of Aliens Ordered Removed from the United States in the Wake of Zadvydas v. Davis*, 25 HOUST. J. INT'L 195, 228 n. 256, 257. According to Recker:

In the USA PATRIOT Act, Congress showed some approval for *Zadvydas*'s presumptively reasonable detention period, but seemed to reject the Court's prohibition of extended detention of aliens who pose a danger to the community. Nevertheless, Congress has yet to directly respond to *Zadvydas*, and the lasting impact of this case upon U.S. immigration law remains to be seen.

Id.

95. See Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills, 78 No. 39 Interpreter Releases 1591, 1593 (Oct. 8, 2001).

96. USA PATRIOT Act, *supra* note 83, § 412 (to be codified at 8 U.S.C. § 1226(a)).

it simply to underscore the scope of our holding.”⁹⁷ The implication seems to be that the “national security” exception carved out in *Zadvydas* still holds. A challenge to the legality of detaining individuals under the Act in *Xi* would likely follow the path of similar challenges under *Zadvydas*.⁹⁸ It is certainly significant, however, that individuals who have never been legally admitted to the United States could potentially have more constitutional rights than individuals who have been residing here as legal permanent residents (LPR’s) for a great many years.

V. THE GLOBAL IMPACT OF XI V. INS

One of the long-term effects of the Ninth Circuit’s holding, should the Supreme Court uphold it, is the potential increase in attempts at entry by individuals from countries where legal immigration is often difficult and ties with the U.S. are strained, such as Cuba.⁹⁹ As suggested by Judge Rymer in her dissenting opinion in *Xi*, a policy allowing for the release of inadmissible aliens into American society would only encourage foreign leaders to rid themselves of certain “undesirable” individuals, such as criminals, by allowing them to travel to the United States without documentation and then refusing to re-admit them.¹⁰⁰ Such a policy will likely put further strain on the United States’ relations with such countries.

Some may argue that the Ninth Circuit’s holding will pose a threat to national security, allowing “rogue” nations to send terrorists to the United States and then to refuse to take them back, effectively allowing them to

97. *Xi*, 298 F.3d at 839.

98. See analysis of *Padilla v. Bush*, *supra* note 90. The District Court found the petitioner’s argument for limited detention under *Zadvydas* unpersuasive, determining provisions of the PATRIOT Act, as well as the holding in *Zadvydas*, allowed for continued detention of individuals involved in “terrorism or other special circumstances.” *Padilla*, 233 F. Supp.2d at 591 (construing *Zadvydas*, 533 U.S. at 696).

99. *Xi*, 298 F.3d at 841. Precisely such a situation has occurred in the past. In early April 1990, approximately 10,800 Cuban citizens sought sanctuary in the Peruvian embassy in Havana as political refugees. *United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983). See also *Alonso-Martinez v. Meissner*, 697 F.2d 1160, 1161 (D.C. Cir. 1983). About 25,000 of the arriving aliens confessed to some kind of criminal history in Cuba, and immigration officials deemed roughly 2,000 refugees’ backgrounds serious enough to warrant continued detention. *Palma v. Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982). Under the discretion accorded to him under 8 U.S.C. § 1182(d)(5)(A), the Attorney General paroled approximately 122,000 Cuban refugees into the United States. *Id.* Although these refugees technically lived within the United States, they were considered *excludable* (pre-IIRIRA term for *inadmissible*) due to their illegal entry and thus subject to deportation. *Id.* Cuba, however, initially refused to accept their return. *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 (11th Cir. 1984). In 1984 Cuba eventually agreed to the return of roughly 3,000 of the aptly named “Marielitos” in 1984. See *Garcia-Mir v. Smith*, 469 U.S. 1311, 1312 (1985). Many remain in INS custody. *Id.*

100. *Id.*

infiltrate our borders. However, cases subsequent to *Zadvydas*, suggest that individuals suspected of engaging in terrorist activity could still be detained indefinitely, due to the “national security” exception to the *Zadvydas*.¹⁰¹

VI. CONCLUSION

As addressed in Sections IV and V, it appears that the *Xi* decision is likely to provide further guidance for judicial interpretation of the PATRIOT Act. It will also substantially shape U.S. foreign policy as it applies to countries who do not accept the return of their own citizens.

In addition, the Ninth Circuit’s holding in is likely to pave the way for new caselaw that further establishes the rights of noncitizens. Immigration policy has taken a one hundred and eighty degree turn from the days of *Mezei*, when the Supreme Court deemed aliens detained inside the United States to be effectively outside its borders with respect to constitutional rights. Now, individuals who have never before gained entry to the United States are accorded many of the same rights as legal residents. This trend in immigration policy is likely to continue as other circuits address the issue of indefinite detention of inadmissible aliens.

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101. See *supra* notes 92-100 and accompanying text.

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