

U.S. IMMIGRATION DETENTION: POLICY AND PROCEDURE FROM A HUMAN RIGHTS PERSPECTIVE

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Good morning everyone. Well, first of all I would like to thank you for inviting us. It is always a wonderful opportunity to explain how immigration laws work and how they are given effect by the Department. On behalf of Mr. Marbury** and myself, thank you very much for having us here. Today Mr. Marbury and I would like to discuss the topic in three parts.

First of all, we want to address how it is that the Department has authority to detain individuals who have been ordered removed. Where does the Department find its authority and how is that authority regulated? Second, we want to discuss some of the cases, in particular the *Zadvydas*¹ decision issued by the Supreme Court, which construed the provisions within the Immigration and Nationality Act,² which address potentially indefinite detention. Lastly, we want to discuss some of the regulatory provisions that have been promulgated by the Department to address the concerns

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

² Immigration and Nationality Act (INA) of 1952, as amended.

that were expressed in the Supreme Court's decision in *Zadvydas* so that Section 241(a)(6), the provision at issue in that case, could be given effect without rendering it constitutionally invalid.

I am going to begin with the statutory framework, which is contained in the Immigration and Nationality Act, or the INA. At the outset, I am going to digress just a bit because I want to make sure we have a clear understanding of the difference between pre-order detention under the Immigration and Nationality Act and post-order detention.

There are distinct provisions within the INA that govern when you can detain an individual who is not subject to a final order of removal and when you can detain an individual who is subject to a final order of removal. Those pre-order provisions – individuals who are not yet subject to a final order of removal – those pre-order provisions are contained in Section 236. You will find in Section 236 provisions that address when detention is mandatory – in other words, when the Department does not have discretion – because of the law – to release somebody from detention. Those are the mandatory detention provisions.

Let me make a point here to make sure it's clear. The mandatory detention provisions are distinct from the potentially indefinite detention provisions that are codified in Section 241(a)(6). Mandatory detention under Section 236 necessarily has an endpoint. It will either end when the individual who is detained and in proceedings is granted relief by the immigration judge (IJ), or it will end when the individual who is detained and in proceedings will be ordered removed by the immigration judge and that individual is removed. So detention under 236 – mandatory detention under 236 – is not indefinite detention under 241(a)(6). It is a different statutory scheme. It is a distinct part of the statute.

The focus, my focus, based on the subject of the panel is going to be indefinite – or potentially indefinite – detention under Section 241(a)(6) of the Act, which addresses detention of post-order aliens, post order individuals. Individuals who have been ordered removed and have a final order of removal.

What does 241 tell us? Section 241(a)(1) tells us that when

an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of ninety days. It doesn't say "may," it doesn't say "might," it says "shall." The Department is under a statutory obligation to remove an individual who has been ordered removed from the United States within ninety days. Now, that 90-day period is called, or known as, the removal period. So the question is what happens if the ninety days come and go, and the Department has not been able to remove an individual who has been ordered removed from the United States. There is a provision in Section 241(a)(3) which addresses that: 241(a)(3) says if you are an individual who has been ordered removed and the government has not been able to remove you within ninety days, the government may release you from detention under supervised release.

Now, the conditions under which the government may release you may vary – you can be released under an order of supervision, particular reporting requirements can be imposed upon your release – but the bottom line is that once those ninety days come and go, once the removal period has expired, if the Department has not been able to effect your removal, the Department has the discretion to release you from detention.

The question is well, if we've got a 90-day removal period and we've got a provision that says that if the 90-day removal period comes and goes you can be released, what's the problem? Well, there's a provision in 241, 241(a)(6), that says that if you are an alien, or an individual – and by the way, the statute reads "alien," and so it's not phrased "individual," and although colloquially the term "alien" may have a pejorative sense, it's simply used in the Act to distinguish between an individual who is a citizen and an individual who is not. In a legal sense, there is no pejorative connotation attached to the term – but if you are an individual who is inadmissible or who is deportable by reason of having violated the criminal laws of the United States or is otherwise a danger to the community, the Department may detain you beyond the removal period.

Now let me distinguish between someone who is inadmissible and someone who is deportable under the INA.

Historically, the INA distinguished between individuals who were excludable (in other words, individuals who were physically present in the country but had never legally been admitted – those are individuals who were excludable); and individuals who had been admitted, i.e. for example, a tourist who arrives at the airport, has his visa stamped and is admitted, is inspected by an immigration official and is admitted; and individuals who were admitted and either overstayed their authorized stay or committed some act that terminated their authorized stay – those individuals are deportable. Historically, there were exclusion proceedings in which individuals who were excludable addressed their right to stay, and deportation proceedings in which individuals who were deportable addressed their right to stay.

The 1996 amendments to the INA eliminated that distinction. We don't have exclusion proceedings anymore. We don't have deportation proceedings anymore. We have a catch-all now, removal proceedings. The distinction between an individual who is excludable and who is deportable was not done away with in its entirety, however, because under the new scheme, under these removal proceedings, individuals are still identified as either inadmissible (someone who has never made a legal entry into the country, so for example, someone who crosses the border under cover of dark and is not inspected and admitted by immigration officials) and individuals who are deportable – again, an individual who has been admitted at a point of entry and for some reason, their authorized stay has been terminated.

Getting back to Section 241(a)(6), 241(a)(6), to review, says that if the ninety days come and go, and the Department has not removed you, the Department may continue to detain you if you are inadmissible, i.e. someone who was never admitted, or if you are deportable, someone who was admitted and has now either violated the criminal laws of the country or is otherwise a danger to the community. In fact, I am going to read 241(a)(6), which is very short, which provides as follows: An alien ordered removed who is inadmissible under section 1182 [which is section 212 of the INA of this title],³ removable under section 1227 [and then it goes on to

³ See INA § 212, 8 U.S.C. § 1182 (2009).

describe the provisions of section 237⁴ of this title] 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).⁵

So, even here, indefinite detention is not mandatory – there is a discretionary element that allows the Department to determine whether someone who is subject to these provisions should be released or remain subject to detention.

Which brings us to *Zadvydas*, the decision in *Zadvydas*, which was a Supreme Court decision that challenged – well, let me back up. What happened in *Zadvydas*? We had two individuals who were detained by the Department pursuant to the provisions of Section 241(a)(6). The Department said your ninety days have lapsed. We haven't been able to remove you. But under 241(a)(6), we're going to continue your detention until we're able to effect your removal from the United States.

And *Zadvydas* gave the Supreme Court occasion to visit the constitutionality of 241(a)(6) – I mean undoubtedly 241(a)(6) allows for potentially indefinite detention. And so what did the Supreme Court say when *Zadvydas* landed on its docket? They said that a statute permitting indefinite detention raises serious constitutional problems, and although they can give effect to the unambiguous intent of Congress, 241 did not express – unambiguously – Congress' intent to indefinitely detain aliens described in the provision, because the statute contains the term “may.” So, there is an ambiguity within the provision; and the Supreme Court said

⁴ See INA § 237, 8 U.S.C. § 1227(a) (2009).

⁵ See INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2009).

Inadmissible or criminal aliens.-An alien ordered removed who is inadmissible under section 212 [8 U.S.C. § 1182], removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) [8 U.S.C. § 1227(a)(1)(C), (a)(2), or (a)(4)] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

because there is an ambiguity, you cannot give effect to what may have been the Congress' intent.

So, they invoke the doctrine of constitutional avoidance to construe a reasonableness requirement into the provision. Again, the provision by itself does not contain a temporal element – it doesn't say that an individual can be detained for so long. But, they invoke a reasonableness requirement. They impose a reasonableness requirement into the statute, and they say this is what we're going to do. The INA gives the Department ninety days to remove an alien. We're going to double that. We're going to give the Department 180 days to remove an individual who is subject to a final order, and by the way, let me reemphasize that.

The potentially indefinite detention provisions of 241(a)(6) apply only to individuals who have been found to not have a right to remain in the country, who have been ordered removed. An individual who is currently in removal proceedings is not subject to the indefinite detention provisions of 241(a)(6).

The Supreme Court says that if you're an individual who has been ordered removed, and the government has failed to remove you within the 90-day period prescribed in 241(a)(1), we're going to say, okay, we're going to double it for the government, we're going to give them 180 days because they think it's reasonable, and the government will have 180 days to remove you. If the 180 days come and go, and the government has not removed you, and there is no significant likelihood of removal in the reasonably foreseeable future – a very important phrase in the decision that led to one of my more favorite acronyms in immigration, "SLRRFF,"⁶ – if there is no "SLRRFF," if you've been detained for 180 days and there is no "SLRRFF," you are entitled to be released.

That is what *Zadvydas* says. Now, why did they say this? Why did *Zadvydas* say this? They point out that in the civil context, indefinite detention is permitted only in certain narrow and non-punitive circumstances where a special justification, such as harm-

⁶ See generally 8 C.F.R. § 241.13 (2005) (setting forth the criteria for determining whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future).

threatening mental illness, is present; and the quote from the decision is where that harm, that threat outweighs the individual's constitutionally protected interest in avoiding physical restraint. In other words, the question to be decided is at what point does an individual's liberty interest run up against the government's obligation to provide for the safety and the welfare of the community. At what point does one interest run up against that obligation? And here is what they said: indefinite detention is constitutionally suspect, unless limited to specially dangerous individuals and subject to strong procedural safeguards. So let's take them in order.

Specially dangerous individuals: They point out, and the case law in this area points out, that the dangerousness – the dangerousness element – must be accompanied by a special circumstance, such as a mental illness that aids or adds and creates a danger. And they point out that you need procedural safeguards. So, we have those two criteria by which we evaluate whether or not a provision that potentially allows for indefinite detention is constitutionally suspect.

What did the Supreme Court say about 241(a)(6)? Well, it doesn't satisfy those requirements. Why? Because it's not narrowly tailored; it encompasses a broad range of individuals, individuals who are inadmissible, which is a relatively large, broad group, as well as individuals who are removable based on criminal offenses but may not necessarily be dangerous. And they say beyond that, the procedural safeguards that are present are not sufficient. The burden is on the alien to demonstrate he is not dangerous, instead of on the government to show that he is. This is a civil context, and so we're going to find that 241(a)(6) just doesn't do it. As written, and as Congress' intent was understood by the Department, 241(a)(6) cannot be given effect. As a result, indefinite detention under 241(a)(6), at least in that sense, is impermissible.

The bottom line is this, according to the Supreme Court: If the Department wants to detain individuals beyond 180 days, they need to show that the individual is especially dangerous (the narrow tailoring requirements). They need to provide procedural safeguards that allow individuals to challenge the detention; and there has to be

no “SLRRFF.”

Which brings us to 8 C.F.R. 241.14. The Department said, very well, there may be problems with 241(a)(6), we’re going to see what we can do to remedy the constitutional defect identified by the Supreme Court in 241(a)(6). So, DHS goes to the drawing board and they address the Supreme Court’s concerns through the regulatory rule making process. They promulgate a regulation, 241.14. Actually, all of 241 addresses post-order detention. There are a number of subsections that set forth the criteria that need to be evaluated when determining whether there is or is not “SLRRFF”; whether there’s a likelihood, or there is a significant likelihood of removal in the reasonably foreseeable future for an individual and the criteria under which an individual should be released. One of the provisions, 241.14, talks about the detention of individuals beyond the removal period, even when there is no “SLRRFF.” And so what is that? That’s indefinite detention. It sounds like indefinite detention, doesn’t it? In fact, if you read the title to 241.14, it’s styled “Continued detention of removable aliens on account of special circumstances.”⁷

In 241.14, the Department sets forth four categories of individuals that may be detained after the 180 days have lapsed and even when there is no “SLRRFF,” and for purposes of this panel, I am going to focus on 241.14, which applies to detention of aliens determined to be specially dangerous, 241.14(f). In that provision, the regulation says – and now let’s recall what the Supreme Court said – the Supreme Court said in order to survive constitutional scrutiny, indefinite detention in a civil context has to be narrowly tailored (remember the mental illness allusion). There have to be procedural safeguards that can be invoked by the individual who is facing indefinite detention, and there can’t be any “SLRRFF.”

What does 241.14(f) do? It tracks the Supreme Court’s instructions, essentially. It does exactly what the Supreme Court says we need to do to make sure we safeguard the welfare of the individual against unreasonable restraints on his liberty, balanced against the obligation to protect the community, the safety and

⁷ 8 C.F.R. § 241.14 (2005).

welfare of the community. These are the elements set forth in 241.14 that allow the Department to make a determination that an individual should not be released from custody. One, is the individual violent? It's not enough for the individual to be violent. There has to be a documented criminal history of an individual having committed crimes of violence. If we've got an individual who's been convicted of committing crimes of violence, then step two, 241.14, applies to individuals who are violent, and not just dangerous, but dangerous because they have a mental disorder and behavior associated with that disorder, which renders them likely to engage in acts of violence in the future.

It is not enough for you to have a violent history – *It's not enough for you to have a violent history*. There has to be a concern that your violent behavior is not only in the past, but that you pose a danger to the community. How does the Department arrive at that conclusion? Well, the regulations also provide for evaluation by mental health experts who can determine whether or not an individual suffers from a mental disorder or condition, and behaviors associated with that disorder, that renders them likely to engage in violence in the future. So, these are not *ad hoc* determinations that are made by folks sitting at a cubicle. These are determinations that are made by following the set of procedures outlined in the regulations that were promulgated specifically to comply with requirements set forth by the Supreme Court in the *Zadvydas* decision.

What are the procedural safeguards? Remember, there were two elements. We need someone who is dangerous – that's what the Supreme Court says, someone who is dangerous, and there have to be procedural safeguards so that person can challenge his or her detention. What are the procedural safeguards that we find in 241.14 that allow an individual subject to indefinite detention to say, "You've got the wrong guy! I'm not the person you were thinking about when they drafted this regulation."

DHS has to establish dangerousness. Again, through criminal history and mental evaluation. They must show probable cause before an IJ that the individual poses a threat if released. In other words, this is not a unilateral decision made by the Department of

Homeland Security. Once the Department of Homeland Security determines that there is an individual in their custody, who if released poses a danger to the safety and welfare of the community, they have to prepare a case; establish probable cause that they then present to an immigration judge, an official of the Department of Justice; and say we believe there is probable cause to have a hearing as to whether or not this person should be detained because of the threat he poses. That individual is entitled to be represented by an attorney during the proceedings; he is entitled to introduce evidence; he is entitled to see the evidence that is introduced against him; and he is entitled to all of the procedural safeguards that an individual who is otherwise in removal proceedings is essentially entitled to.

Ultimately, the determination as to whether or not an individual who is subject to a final order of removal, in other words, an IJ has already determined that this individual has no right to remain in the country – ultimately the decision is made by an immigration judge, whether that individual subject to a final order of removal, who the Department of Homeland Security believes is a threat to the community, is entitled to be released from detention. Now, *if the immigration judge finds* – an independent adjudicator finds – that the Department has demonstrated that in fact this individual if released poses a threat, the individual can request that his case be reevaluated every six months and a new determination be made as to whether or not his continued detention is advisable given the facts as they stand at that time.

And so, ultimately, the question boils down to whether we believe that immigration should be regulated or not. If we believe that immigration should be subject to some regulation, the question is, “how do we regulate it”? In the case of an individual who has been ordered removed, has no legal right to remain in the country and who, otherwise poses a danger to the community - does that individual’s right to be free from restraint trump the rights of the citizenship, citizens and legal permanent residents, to be safe and secure? Does that right trump the government’s obligation to provide for the welfare and security of the community?