

STATEMENT OF THOMAS H. DUPREE, JR.
Former Principal Deputy Assistant Attorney General
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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION POLICY AND
ENFORCEMENT

CONCERNING A BILL PROVIDING FOR THE DETENTION OF
DANGEROUS ALIENS

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Thank you, Chairman Smith, for inviting me to address an important legal issue that has immense, practical, real-world consequences: the executive branch's authority to detain dangerous aliens.

I served as Principal Deputy Assistant Attorney General under President Bush, and am very familiar with the flaw in our Nation's laws that is the subject of today's hearing. Indeed, this is a problem that is well known within the legal and law enforcement communities.

Although Congress in 1996 had granted the executive the power to detain removable aliens for extended periods, the courts have interpreted the law so as to require their release after a mere six months, unless the government can show that their removal is reasonably foreseeable. In many instances, however, removal is *not* reasonably foreseeable — the alien's country of origin may not take him back; our obligations under

the Convention Against Torture may not permit our removing him to his country of origin; or his country of origin may simply be unknown.

The consequence is that, under current law, the government is compelled to release — into our communities — murderers, child molesters and other predators who pose a clear and direct threat to public safety and national security.

Congress has the power to fix this problem. The Supreme Court has never denied Congress the constitutional authority to provide for extended periods of detention. Quite the contrary. The Supreme Court has *invited* Congress to legislate in this area and to amend existing law in a way that clarifies the circumstances under which extended detention is permissible and that specifies the procedures that the executive must follow in approving detention for longer periods.

The proposed legislation accepts the Supreme Court's invitation. It specifies the types of aliens that may be detained for extended periods — a small segment of particularly dangerous individuals — and sets forth the process through which the Secretary of Homeland Security must determine that detention is warranted. There can be no question that this bill will clarify the law; it will expressly vest the executive with powers necessary to keep dangerous aliens off the street; and it will make America safer.

I. Zadvydas and Clark

When an alien has been found to be unlawfully present in the United States and a final order of removal has been entered, the government ordinarily removes the alien during the subsequent 90-day removal period, during which time the alien is typically

held in custody. 8 U.S.C. § 1231(a)(2). If the government is unable to remove the alien within 90 days, then further detention is authorized under 8 U.S.C. § 1231(a)(6). That provision — commonly known as the post-removal-period detention statute — provides that certain aliens, including criminal aliens or those who pose a national security or public safety threat, “may be detained beyond the removal period.” It applies to aliens ordered removed who are inadmissible, removable or who present a flight risk or danger to the community. *Id.*

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court construed the post-removal-period detention statute to incorporate a presumptive six-month limit on the detention of removable aliens. The Court held that the statute did not authorize the government to detain a removable alien indefinitely, but only for that period reasonably necessary to secure the alien’s removal. Because indefinite detention “would raise serious constitutional concerns,” the Court “construed the statute to contain an implicit ‘reasonable time’ limitation.” *Id.* at 682. According to the Court, once an alien has been detained for six months under the statute — that is, six months after the end of the 90-day removal period — he must be released, unless the government can establish that his removal is “reasonably foreseeable.” *Id.* at 699.

The Court decided *Zadvydas* not on constitutional grounds, but as a matter of statutory interpretation. It focused on the statute’s use of the word “may” — the alien “may” be detained beyond the removal period — and stated that “[i]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms.” 533 U.S. at 697; *see also id.* at 699 (“We have found nothing in

the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention.”). The Court qualified its holding by noting that it was not “consider[ing] 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 696.

Justice Kennedy, in a dissent joined in relevant part by Chief Justice Rehnquist and Justices Scalia and Thomas, criticized the majority for “weakening the hand of our Government” and “committing [a] grave constitutional error by arrogating to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation’s most sensitive negotiations with foreign powers; and then likely releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or both.” 533 U.S. at 705, 713 (Kennedy, J., dissenting).

Four years later, the Supreme Court expanded the sweep of *Zadvydas* in *Clark v. Martinez*, 543 U.S. 371 (2005). In *Clark*, the Court held that *Zadvydas*’s six-month limit applied to inadmissible aliens — those who never had any legal right to enter the United States in the first place. The Court reasoned that “[t]he operative language of § 1231(a)(6), ‘may be detained beyond the removal period,’ applies without differentiation to all three categories of aliens that are its subject.” *Id.* at 378. Thus, the Court determined that the six-month limit also applied to aliens who present a danger to the community. *See* 8 U.S.C. § 1231(a)(6) (authorizing detention of aliens who have

been “determined by the [Secretary of Homeland Security] to be a risk to the community or unlikely to comply with the order of removal . . .”).

The Court concluded by acknowledging the public safety concerns raised by the government and inviting Congress to amend the statute:

The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it.

Id. at 386 (emphasis added). The Court noted that shortly after *Zadvydas* was decided, Congress passed the USA Patriot Act, which authorized continued detention of aliens whose removal was not reasonably foreseeable and who presented a national security threat or had been involved in terrorist activities. *Id.* at 386 n.8 (citing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412(a), 115 Stat. 350 (enacted Oct. 26, 2001) (codified at 8 U.S.C. § 1226a(a)(6))).

Several circuit courts have applied *Zadvydas* and *Clark* to order the release of dangerous aliens. In *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004), the Ninth Circuit relied on *Zadvydas* in directing the government to release a violent and mentally ill alien who had been convicted of assault and rape. In dissenting from the denial of rehearing en banc, Judge Kozinski condemned the majority for “releas[ing] into the population of our circuit an individual who has been found, by clear and convincing evidence, to be mentally disturbed and dangerous.” 389 F.3d 967, 967 (9th Cir. 2004) (Kozinski, J., dissenting).

In *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008), the court invoked *Zadvydas* and *Clark* in affirming the release of a mentally ill criminal alien who murdered his wife in the presence of their seven-year-old daughter. The court noted that it was “sympathetic to the Government’s concern for public safety,” but explained that it was “without power to authorize [the alien’s] continued detention under § 1231(a)(6).” *Id.* at 485. The court concluded with the same advice — look to Congress to fix the problem — offered by the Supreme Court in *Clark*:

We note . . . that in a similar circumstance where public safety was also of great concern, Congress took prompt action to address the issue [by enacting the USA Patriot Act]. . . . Thus, not only are the Government’s concerns properly directed to Congress, but importantly Congress has shown that it has the authority and willingness to address these concerns.

Id. at 485.

One circuit court has taken a different approach. The Tenth Circuit, in a careful and scholarly opinion by Judge McConnell, upheld against a *Zadvydas* challenge a Justice Department regulation authorizing the extended detention of aliens determined to pose a special danger to the public. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008). The court explained that the regulation was a reasonable and permissible interpretation of the post-removal-period detention statute, and was owed deference under the principles set forth in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005), notwithstanding the Supreme Court’s earlier contrary interpretation of the statute. The court went on to reject the argument that the detention scheme violated due process. “Although there is no one

formulation that signals when a civil detention scheme is permissible, those schemes which comport with due process typically apply narrowly to a small segment of particularly dangerous individuals and include meaningful procedural protections.” *Id.* at 1251. The court concluded that the Justice Department’s regulations passed constitutional muster. *Id.* at 1251-56.

II. The Urgent Need for Amendment

Soon after *Zadvydas* was decided, Attorney General John Ashcroft expressed deep concern that the ruling threatened public safety. He said that many of the criminal aliens who would be set free as a result of the decision “have extensive histories of brutal violent crime and pose a danger to society.” He added that he was “especially concerned that these criminal aliens may re-enter and prey upon immigrant communities in the United States.”¹

The Attorney General’s grim forecast has proven accurate. The impact of *Zadvydas* was immediate and substantial. One study found that in the two months following *Zadvydas*, 829 criminal aliens were released into the United States, and thousands more were released in the years that followed.²

¹ *U.S. Ponders Release of Criminal Aliens*, CNN Justice (July 19, 2001), http://articles.cnn.com/2001-07-19/justice/ashcroft.ins.detaine_1_criminal-aliens-ins-immigration-and-naturalization-service?_s=PM:LAW.

² Rachel Canty, *The New World of Immigration Custody Determinations After Zadvydas v. Davis*, 18 *Geo. Immigr. L.J.* 467, 468 (2004).

There are many tragic stories of released criminal aliens terrorizing our communities. Abel Arango, a Cuban national, spent more than four years in prison for armed robbery and other crimes. When the United States attempted to remove him, Cuba refused to accept him, and *Zadvydas* compelled his release. Arango later murdered a Florida police officer, shooting him in the face at point-blank range. Huang Chen, a Chinese national whom China refused to repatriate, murdered a New York woman soon after being released pursuant to *Zadvydas*.

The impact of *Zadvydas* continues today, as DHS is legally compelled to set loose individuals who are criminally violent and very likely to commit additional crimes once released. A 2007 audit conducted by the Inspector General of the Department of Justice found that out of a sample of 100 criminal aliens, 73 had an average of six arrests each after being released. According to the Inspector General, the study “produced results that, if indicative of the full population of criminal aliens identified, suggest that the rate at which released criminal aliens are re-arrested is extremely high.”³

The need for amendment is acute. Protecting public safety is one of the most fundamental obligations of government, yet under current law, the government is compelled to set dangerous criminals loose on the streets of the United States. In many instances, these are individuals who never had any right to be in the United States in the first place.

³ *Illegals Become Repeat Criminals*, Washington Times (Jan. 9, 2007), <http://www.washingtontimes.com/news/2007/jan/9/20070109-122510-1365r>.

There is absolutely no reason to leave uncorrected a law that compels the release of some of the most dangerous and deranged individuals in federal custody. Often their home countries do not want them back precisely *because* their crimes were so heinous. *See Zadvydas*, 533 U.S. at 715 (Kennedy, J., dissenting) (“Because other nations may refuse to admit aliens who have committed certain crimes, often the aliens who have committed the most serious crimes will be those who may be released immediately under the majority’s rule.”) (internal citation omitted).

The proposed legislation will protect the American people by giving the Department of Homeland Security and the Department of Justice the legal tools they need to keep these dangerous predators off our streets. At the same time, the bill appropriately addresses the constitutional concerns identified by the *Zadvydas* Court and discussed at length by the Tenth Circuit in its *Hernandez-Carrera* decision. It narrows the potential sweep of the post-removal-detention statute by limiting it to a small segment of particularly dangerous individuals. It provides for regular and individualized assessments of the need for continued detention by high-level officials within the Department of Homeland Security, as well as the opportunity to have those assessments reviewed by a federal court.

The Supreme Court and the Fifth Circuit have both recognized the dangers arising from *Zadvydas* and emphasized that the solution rests with Congress. Those courts have invited Congress to amend the post-removal-detention statute by speaking more precisely and thereby avoiding constitutional problems.

For all these reasons, I support the Subcommittee's efforts to address this critical issue and look forward to your questions. Thank you again for permitting me to share my views.