RECENT DEVELOPMENTS IN INTERNATIONAL LAW: ANTI-TERRORISM LEGISLATION–PART TWO: THE IMPACT AND CONSEQUENCES

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> *A society that will trade a little liberty for a little order will deserve neither and will lose both.*[1]

I. INTRODUCTION

The first article in this two-part series appeared in the Fall 2001 edition of *The Journal of Transnational Law & Policy*.[2] That article presented a summary of the legislative wildfire that had engulfed legislative bodies worldwide. More significantly, however, it questioned the effects that such legislation would have on society, especially a liberty-based society such as the United States of America.[3]

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Any opinions expressed herein are those of the author and do not necessarily reflect the official policy or position of the *Journal of Transnational Law & Policy*, The Florida State University College of Law, The Florida State University, or any other governmental entity.

1. Williams v. Garrett, 722 F. Supp. 254.256 (W.D.Va. 1989) (quoting Thomas Jefferson).

2. Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation–Part One: An Overview*, 11 J. TRANSNAT'L L. & POL'Y 183 (2001).

3. *Id.*

In this piece, the analysis of the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001[4] that was begun in the first part of this series will be continued.[5] Particularly Part II will discuss sections of the USA PATRIOT Act that attack the very essence of a democratic society. Focus will be limited to sections 411 and 412, as they are more relevant to an analysis of due process rights. A brief analysis of provisions in the Model Penal Code and the United States Code, as they relate to crimes that fall under the new definitions set forth by the USA PATRIOT Act will also be conducted. Part III will present an argument addressing the constitutionality of sections 411 and 412 of the USA PATRIOT Act and how it violates the due process rights of aliens according to the guarantees that the Due Process Clause provides aliens. Part IV will be comprised of an analysis of the USA PATRIOT Act in light of the Supreme Court's recent decision in *Zadvydas v. Davis*.[6] Part V concludes by asserting that sections 411 and 412 of the USA PATRIOT Act are unconstitutional because they deny aliens rights guaranteed to them by the United States Constitution.

II. THE "USA PATRIOT" ACT OF 2001

A. Section 411

Section 411 of the USA PATRIOT Act, entitled "Definitions Relating to Terrorism," provides for a broad definition of "terrorist activity" and "engaging in terrorist activity."[7] By amending section 1182 of the Immigration and Nationality Act,[8] Congress expanded the number of aliens that could be removed by broadening the definitions of terrorist activity to include those who use a firearm during the course of any unlawful activity.[9] Thus, any alien who

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4. Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].
5. Zelman, *supra* note 2, at 186-88.
6. 533 U.S. 678 (2001).
7. USA PATRIOT Act, *supra* note 4, § 411(a).
8. 8 U.S.C. § 1101 *et seq.* (2001) [hereinafter INA].
9. USA PATRIOT Act, *supra* note 4, § 411(a)(1)(E). Section 1182(a)(3)(b)(iii) now makes it a terrorist act to do any act that is unlawful:

> [U]nder the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:
> (I) The hijacking . . . of any conveyance. . . .
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person . . . to do or abstain from doing any act. . . .
> (V) The use of any—
> (b) explosive, firearm, or other weapon or dangerous device . . . with intent to endanger . . . the safety of one or more individuals or to cause substantial damage to

commits any property crime or crime involving the use of a weapon, even if such crime takes place in another country, can be removed under the provisions of the USA PATRIOT Act.

Additionally, section 411 redefines the term "engage in terrorist activity."[10] This definition supplements the definition of "terrorist activity,"[11] thereby making an alien removable by merely providing food or housing for a friend or family member who is allegedly involved with a terrorist organization, whether or not such alien knew that the friend or family member was involved in such activity.[12]

B. Section 412

Merely upon perusing the table of contents of the USA PATRIOT Act, one's eye would be drawn to the wording of the title to this section.[13] This section has the effect of allowing the indefinite detention of aliens when the Attorney General "has reasonable grounds to believe that the alien [is a terrorist]."[14] Additionally, an alien may be held for a period of seven days without even being charged with a crime, let alone an immigration violation.[15]

The Attorney General is given the discretion to certify an alien as a terrorist.[16] However, once such certification is made, all discretion is eliminated,[17] and custody must be "maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer [one that

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property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182.

10. USA PATRIOT Act, *supra* note 4, § 411(a)(1)(F).

11. *See supra* notes 9, 10 and accompanying text.

12. Specifically, Section 1182(a)(3)(B)(iv)(VI) states:

> [T]o commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit . . . (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity [as defined above].

Id.

13. Section 412 is entitled, "Mandatory detention of suspected terrorists; habeas corpus; judicial review." This section amends the INA by adding section 1226a.

14. 8 U.S.C. § 1226a(a)(3).

15. *Id.* § 1226a(a)(5).

16. *Id.*

17. *Id.* § 1226a(a)(1). This subsection states that, "[t]he Attorney General *shall* take into custody any alien who is certified under paragraph (3)." *Id.* (emphasis added).

can be certified]."[18] The section does include a provision that presumably limits the length of time that an alien may be detained.[19] However, a close reading reveals that detention may be continued for additional six month periods if the Attorney General continues to assert that the alien poses a threat to national security or to the safety of others.[20] Such detention is continued regardless of whether the alien has a reasonable chance of actually being removed.[21]

Notwithstanding the alleged protections written into this section, the Attorney General is given the discretion to release an alien when such alien's certification under subsection 3 is revoked.[22] If such alien is actually released, he or she may still be subject to conditions regarding their release.[23] This is so, even though they have not been charged with a crime.[24]

C. Discussion

To highlight the absurd result that such definitions have on aliens who have committed crimes in the United States, this author will now examine some of the criminal laws of the United States, using the definitions of crime given by the Model Penal Code ("Code")[25] and selected federal crimes.

A list of the crimes whose definitions would satisfy the standards, under the revisions to the INA made by the USA PATRIOT Act, include: kidnaping,[26] assault,[27] and arson.[28]

Kidnaping meets the definition of terrorist activity as provided in section 412 of the USA PATRIOT Act.[29] The Code provides that it is unlawful to confine someone for an amount of time with the intent to hold them for ransom or as a hostage or "interfere with the performance of any governmental or political function."[30] Thus if someone, who just so happens to be an alien, kidnaps her own child while involved in a custody dispute, the USA PATRIOT Act

18. *Id.* § 1226a(a)(2).
19. *Id.* § 1226a(a)(6).
20. *Id.*
21. *Id.*
22. *Id.* § 1226a(a)(7).
23. *Id.*
24. *See id.*
25. MODEL PENAL CODE (American Law Institute 1962) [hereinafter CODE].
26. *Id.* § 212.1.
27. *Id.* § 211.1.
28. *Id.* § 220.1.
29. *Id.* § 212.1; *see also* USA Patriot Act, *supra* note 3, § 412.
30. CODE, § 212.1.

gives the Attorney General the discretion to label her a terrorist, thus foreclosing her chances of actually being removed.[31]

The crime of assault would also allow the Attorney General to certify an alien as a terrorist and hold her indefinitely. According to the Code, an assault occurs when one causes injury to another's person with or without a deadly weapon.[32] Thus, under the USA PATRIOT Act, an alien qualifies as a terrorist if she hits her boyfriend with a stick, breaking his arm.[33] The same provision of the USA PATRIOT Act makes someone a terrorist for burning down her own business, even though sheis doing so in order to collect money from her insurance company.[34]

Additionally, it is also now a terrorist act to carjack someone,[35] follow someone across state lines to harm them[36] or to commit a drive-by shooting.[37] All involve an act that many times include the use of a deadly weapon or the threat of force. However, none of these crimes have anything to do with terrorism. Furthermore, the certification required under the USA PATRIOT Act is solely at the discretion of the Attorney General, which raises an equal protection issue. For example, on March 26th, a U.S. citizen drove his truck into a mosque in Tallahassee, Florida.[38] The man, Charles D. Franklin, had a history of psychiatric problems[39] and had recently stopped taking his medication.[40] He is being charged with a federal hate crime, with a penalty of up to 20 years in prison, however his psychiatric problems will likely serve as a significant mitigating factor when it comes to sentencing.

Now assume that Mr. Franklin were a resident alien from a European country. Under the USA PATRIOT Act, he can now be

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31. For a discussion of the stigma that causes this, see *How the USA-PATRIOT Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists*, AMERICAN CIVIL LIBERTIES UNION (Oct. 23, 2001), *available at* http://www.aclu.org/congress/I102301e.html.

32. CODE §§ 211.1(1)(a) & (2)(b).

33. *See* USA PATRIOT Act, *supra* note 4, § 411(a)(1)(E)(V).

34. Section 220.1 of the CODE defined arson as the starting or causing of a fire or explosion with the intent to destroy or damage a building. Section 411 makes it a terrorist act to use an explosive to cause "substantial damage to property." USA PATRIOT Act, *supra* note 4.

35. *See* 18 U.S.C. § 2119 (Motor Vehicles). This section provides, in part, that: "[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle . . . from the person or presence of another by force and violence or intimidation . . . [is guilty of car jacking]." *Id*.

36. *See* 18 U.S.C. § 2261A (Interstate Stalking).

37. *See* 18 U.S.C. § 36 (Drive-by shooting).

38. *Truck Carrying Christian Materials is Driven into Mosque before Prayers*, AP NEWSWIRES, Mar. 26, 2002, *available at* 3/26/02 APWIRES 11:59:00.

39. *Feds Charge Tallahassee Man Who Drove Truck into Mosque*, AP NEWSWIRES, Mar. 29, 2002, *available at* 3/29/02 APWIRES 16:39:00.

40. *Id*.

labeled a terrorist and held indefinitely without the benefit of a criminal trial.

III. PROCEDURAL DUE PROCESS

A. Generally

The Due Process Clause of the Fifth Amendment state that "[n]o *person* shall . . . be deprived of life, liberty, or property, without due process of law."[41] This provision does not only apply to citizens of the United States of America, as all citizens are persons, but not all persons are citizens. Our founding fathers' intent was to provide these rights to everyone within the jurisdiction of the United States, without regard to citizenship. Justice White, writing for the Court in *Wolff v. McDonnell*,[42] stated that, "[t]he touchstone of due process is protection of the individual against arbitrary action of the government."[43]

1. Property Interests

Property interests are not defined in the Constitution or by the courts. Such interests are created and defined by "rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[44] However, when the government seeks to take away such property, certain procedural safeguards must be in place to guarantee that such person's rights are not being violated.[45]

Prior to 1970, the United States Supreme Court had held that due process concerns arise in the denial of such benefits as tax exemptions,[46] unemployment compensation,[47] and discharge from public employment.[48] In 1970, the Court decided *Goldberg v. Kelly*. The *Goldberg* court was presented with the issue of whether recipients of welfare benefits were entitled to evidentiary hearings prior to their benefits being terminated.[49] The government, in defense of the procedures it had in place, which did not include an evidentiary hearing, argued that welfare benefits were a privilege

41. U.S. CONST. amend. V (emphasis added).
42. 418 U.S. 539 (1974) (citing Dent v. W. Va., 129 U.S. 114 (1889)).
43. Dent v. W. Va., 129 U.S. 114, 123 (1889).
44. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
45. *Id.* at 576. *See also* Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970); Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).
46. Speiser v. Randall, 357 U.S. 513 (1958).
47. Sherbert v. Verner, 374 U.S. 398 (1963).
48. Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956).
49. *Goldberg*, 397 U.S. at 260.

and not a right. The court, in response, cited to *Shapiro v. Thompson*,[50] in which it had already determined that such argument was insufficient to justify the denial of a benefit.[51] The Court held that prior to the termination of welfare benefits, an evidentiary hearing would be required in order to guarantee procedural due process,[52] stating that "[p]ublic assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'"[53] In so holding, the Court reiterated its holding in *Greene v. McElroy*,[54] when it stated that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. . . . They have ancient roots. . . . It has spoken out . . . in all types of cases where administrative . . . actions were under scrutiny.[55]

Thus, a property interest is obtained by a person through a legislative or administrative action. However, not all property interests are ones that should be protected by the Due Process Clause. In *Board of Regents v. Roth*,[56] the Court, in defining the extent to which the respondent had a property interest, stated that, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it."[57] In *Roth*, the Court determined that the property interest was defined by the

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50. 394 U.S. 618 (1969).
51. *Id.* at 627 n.6.
52. *Goldberg*, 397 U.S. at 264.
53. *Id.* at 265.
54. 360 U.S. 474 (1959).
55. *Goldberg*, 397 U.S. at 270 (citing *Greene*, 360 U.S. at 496-97).
56. 408 U.S. 564 (1972).
57. *Id.* at 577.

contract that the respondent had with the petitioner. And since the contract expressly provided that the term of the contract was for one year, and that any renewal was purely discretionary, the respondent had no legitimate claim to continued employment.[58] However, in *Roth's* companion case, *Perry v. Sindermann*,[59] the Court held that there was an implied promise of tenure that the petitioner possessed.[60] As such, Perry was entitled to a hearing in which he could be informed of the grounds for which he was dismissed.[61]

In *Goss v. Lopez*,[62] the Court held that students who had been suspended were entitled to notice of the reasons for such suspension and a hearing at which they could present evidence.[63] Since the state was required to provide a free education and the school district had a mandatory attendance policy, a student was afforded a property interest in attending school. Accordingly, a school could not impose suspensions in an arbitrary manner.[64]

Though a state can define the benefit, it cannot also restrict the right by defining the process in a manner that does not comply with the Due Process Clause. In *Vitek v. Jones*[65] and *Cleveland Board of Education v. Loudermill*,[66] the Court held that minimum procedural requirements are a matter of federal law and cannot be restricted by a state.[67]

2. Liberty Interests

While property interests are defined by states, liberty interests are defined by the courts in interpreting the Constitution. The Court has stated that "where the State attached 'a badge of infamy' to the citizen, due process comes into play."[68] Thus, the right to be heard before losing a right is a basic premise of due process, even when the stigma involved does not reach the level of that associated with a criminal conviction.[69]

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58. *Id.* at 578.
59. 408 U.S. 593 (1972).
60. *Id.* at 599-600.
61. *Id.* at 603.
62. 419 U.S. 565 (1975).
63. *Id.* at 581.
64. *Id.* at 576.
65. 445 U.S. 480 (1982).
66. 470 U.S. 532 (1985).
67. *Vitek*, 445 U.S. at 491; *Loudermill*, 470 U.S. at 541.
68. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (citing Wieman v. Updegraff, 344 U.S. 183, 191 (1952)).
69. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

In *Jackson v. Indiana*,[70] the Court asserted its approval of indefinite commitment of individuals under appropriate circumstances. Such commitment is constitutional when the individuals are found to be 1) insane or mentally incompetent, and 2) will probably endanger the safety of officers, the property, or other interests of the United States, and 3) suitable arrangements for the custody and care of the prisoner were not otherwise available. Such person is entitled to be released if, and when, any of the three conditions cease to be present.[71] Without the finding of dangerousness, a person committed can only be held for an amount of time reasonably necessary to "determine whether there is a substantial probability of [her] attaining the capacity [to stand trial]."[72] If there is no reasonable chance that she will attain such capacity, then she must be released or a court must find the presence of the three aforementioned factors.[73]

For these reasons, the Court ruled that the pretrial detention of an individual would not be permissible where there is no reasonable chance for such person to become competent to stand trial.[74] Additionally, the Court held that due process also required "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[75] Hence, the Court developed the "dangerous-plus" standard for the indefinite commitment allowed by the Court.

While the issue in *Jackson* involved an individual who had not yet stood trial, *Foucha v. Louisiana*[76] involved an individual who had been found not guilty by reason of insanity. Louisiana law allowed the involuntary civil commitment of persons acquitted of a crime when, because of mental illness, the person is deemed too dangerous to be released.[77] However, the Court, had previously held that in order to satisfy due process, such confinement would only be constitutional if the individual is both mentally ill and a danger to herself and others.[78] In those decisions, however, the Court had assumed that at the time of sentencing, "the defendant was still mentally ill and dangerous."[79] Thus, once the individual

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70. 406 U.S. 715 (1972).
71. *Id.* at 732.
72. *Id.* at 738.
73. *Id.* at 733.
74. *Id.* at 738.
75. *Id.*
76. 504 U.S. 71 (1992).
77. *Id.* at 74.
78. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975); Jones v. United States, 463 U.S. 354 (1983).
79. *Foucha*, 504 U.S. at 76.

ceased to be both mentally ill and dangerous, she must be released.[80] The *Foucha* court held that since the defendant had not been convicted, he could not be punished.[81] Notwithstanding the fact that he had not been convicted, the Court had previously permitted detention of mentally ill persons when a State proves by clear and convincing evidence that the person is mentally ill and dangerous.[82]

The government in *Foucha* attempted to rely on *United States v. Salerno*[83] for support of its contention that commitment of certain persons is permissible under narrow circumstances. However, *Salerno* involved pretrial detention of defendants under the Bail Reform Act of 1984 ("BRA"),[84] and the *Foucha* Court had ruled that the defendant could not be held post-acquittal since he was sane at the time of sentencing.

The BRA provided for the detention of individuals awaiting trial when a court determined that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[85] The Court of Appeals for the Second Circuit had struck down this section as unconstitutional on its face.[86] However, the Supreme Court held that in appropriate circumstances, the interest in public safety can "outweigh an individual's liberty interest."[87] The Court took note of the fact that the BRA only applied to a few extremely serious crimes and further, stated that, "the government must convince a neutral decision maker by clear and convincing evidence that no condition of release can reasonably assure the safety of the community or any person."[88] In ruling that the BRA was not unconstitutional on its face, the Court relied upon the procedural protections afforded to a defendant under the provisions of the BRA.[89]

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80. *Id.* at 77; *see also O'Connor*, 422 U.S. at 563; *Jones*, 463 U.S. at 354.
81. *Foucha*, 504 U.S. at 80.
82. *Id.* (citing *Jones*, 463 U.S. at 362).
83. 481 U.S. 739 (1987).
84. 18 U.S.C. § 3141 *et seq.*
85. 18 U.S.C. § 3142(e).
86. *Salerno*, 481 U.S. at 741.
87. *Id.* at 748. Here, the Court made reference to the detention of persons that the Government believes to be dangerous during times of war.
88. *Id.* at 750.
89. *Id.* at 751 (the safeguards recognized by the court included the right to counsel, the right to testify on one's own behalf and present evidence, the right to cross-examine witnesses and the right to an immediate appellate review of the findings of the judicial officer).

The Court revisited the issue of involuntary civil commitment in *Kansas v. Hendricks*.[90] In *Hendricks* the Court examined the Kansas Sexually Violent Predator Act ("SVPA"),[91] which gave the state the power to civilly commit an individual upon the completion of that individual's prison term if that person was, due to mental abnormality or personality disorder, "likely to engage in 'predatory acts of sexual violence.'"[92] By its terms, the SVPA applied to any person who was incarcerated as a result of a violent sex offense, or someone who had been charged with such an offense but found to be incompetent for purposes of trial, or had been found not guilty by reason of insanity of a sexually violent crime, or not guilty by reason of mental disease or defect of a sexually violent crime.[93]

The Court outlined the procedures provided for in the SVPA. Briefly, when, as in the case of *Hendricks*, a currently confined person was 60 days away from release, the local prosecutor would have 45 days "to decide whether to file a petition in state court seeking the person's involuntary commitment."[94] If the court found probable cause to believe that the person was a violent sex offender, then the individual would be transferred to a secure psychiatric facility for evaluation.[95] After this, a trial would be held to determine whether, beyond a reasonable doubt, the person was a violent sex offender. The individual was also provided with counsel[96] and given the opportunity to present evidence and cross-examine witnesses.[97] If the individual was, in fact, determined to be a violent sex offender, he was then given a choice of procedure for review.[98]

The Court agreed with Kansas that the procedures provided to individuals confined under the SVPA were adequate to protect such individuals' rights. Stating that "[i]t thus cannot be said that the involuntary civil commitment of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty,"[99] the Court held that the SVPA falls into the narrow category of laws

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90. 521 U.S. 346 (1997).
91. KAN. STAT. ANN. § 59-29(a)(1) *et seq.* (1994).
92. *Hendricks*, 521 U.S. at 350 (citing SVPA).
93. *Id.* at 352.
94. *Id.* (citing SVPA, §59-29(a)(3)).
95. *Id.* (citing SVPA, §§ 59-29(a)(4)-(5)).
96. *Id.* (citing SVPA, § 59-29(a)(6)).
97. *Id.* (citing SVPA, § 59-29(a)(7)).
98. *Id.* at 353. The SVPA provided for three avenue of review, the first, under Section 59-29(a)(8), was for an annual review by the court concerning continued detention; the second, under Section 59-29(a)(10), the Secretary of Social and Rehabilitation Services could decide that the person's condition had improved such that release was appropriate; and third, under Section 59-29(a)(11), the individual could petition for release at any time.
99. *Id.* at 357.

limiting civil commitment to those who are found to be dangerous "and then links that finding [of dangerousness] to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control [her] dangerous behavior."[100]

B. Constitutional Rights as applied to Aliens

In 1886, the United States Supreme Court decided *Yick Wo v. Hopkins*.[101] In *Yick Wo*, the Court, while addressing the application of a laundry ordinances in San Francisco, stated that the protections of due process "are universal in their application, to all persons within the territorial jurisdiction [of the United States] without regard to any differences of . . . nationality."[102] Thus, once an alien is physically present in the United States, even when her presence is illegal, she is a person who cannot be deprived of liberty without due process of law.[103] The rights of those who have been lawfully admitted hold even more weight than those who are present in the country illegally.[104] In holding that the ordinance was an unconstitutional deprivation of rights by a state actor, the Court held that, "[t]hough [it is] fair on its face . . . if it is applied . . . with an evil eye and an unequal hand . . . to make unjust and illegal discriminations . . . the denial of equal justice is still within the prohibition of the constitution."[105]

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100. *Id.* at 358 (citing SVPA, § 59-29(a)(2)(b)).

101. 118 U.S. 356 (1886).

102. *Id.* at 369 (this case is also cited for the premise that even though an act is facially race-neutral, it is nevertheless unconstitutional when applied in a way that affects one race more than it does another and is a violation of equal protection to apply the act in an invidiously discriminatory manner).

103. Plyler v. Doe, 457 U.S. 202, 210 (1982) (finding that even illegal aliens are entitled to the protections of the Fifth and Fourteenth Amendments).

104. This concept is succinctly stated by Lisa Cox in her Note, *The Legal Limbo of Indefinite Detention: How Long Can You Go?*, in which she states:

> Once an alien has been admitted as a lawful permanent resident however, the government's foreign policy and national sovereignty concerns are much less compelling. Issues concerning these aliens, such as indefinite detention policies aimed at protecting the community, are more domestic than international in nature and represent congressional interest in maintaining a safe society. Because cases involving lawfully admitted aliens do not generally invoke international or foreign policy concerns, the need for adherence to the plenary power doctrine and judicial deference in deciding these cases is significantly diminished.

50 AM. U.L. REV. 725, 734-35 (2001) (citations omitted); *see, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 99-101 (1903) (rejecting the government's argument that the executive's plenary powers override basic due process rights of resident aliens).

105. *Yick Wo*, 118 U.S. at 373.

The Court addressed the rights of aliens again ten years later in *Wong Wing v. United States*.[106] In *Wong Wing*, the Court had to consider whether it was constitutional to supplement the provisions for exclusion and expulsion with hard labor without a trial by jury.[107] The Court recognized that detention is a deprivation of liberty that accompanies arrest for commission of a crime, or the allegation thereof, but that such detention was not tantamount to imprisonment.[108] However, the Court noted that criminalizing the presence of an alien in the United States and punishing them with imprisonment would only be constitutional if the aliens were afforded a trial.[109]

In a case factually similar to what the USA PATRIOT Act is attempting to do, the Court decided *Bridges v. Wixon* in 1945.[110] In *Bridges*, the government was attempting to deport a resident alien for allegedly being a member of the Communist Party.[111] Although the Board of Immigration Appeals found that he had not been a member or affiliated with the Communist Party since entering the country, the Attorney General adopted the findings of the inspector and ordered Mr. Bridges be deported.[112] In ruling that the definition of affiliation adopted by the Attorney General was over broad,[113] the Court analogized deportation to a criminal proceeding while acknowledging that they are not "technically" the same.[114] Furthermore, the Court stated that, "it visits a great hardship on the individual and deprives him of the right to . . . live . . . in this land of freedom. . . . deportation is a penalty. . . . [m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[115] The Court

106. 163 U.S. 228 (1896).
107. *Id.* at 235.
108. *Id.* at 235-36.
109. *Id.* The Court stated that, "[t]o declare unlawful residence within the country to be an infamous crime . . . would be to pass outside the sphere of constitutional legislation, unless . . . the fact of guilt [were] established by a judicial trial." 163 U.S. at 237.
110. 326 U.S. 135 (1945).
111. *Id.* at 138. The government had actually made a previous attempt to deport Mr. Bridges in 1938 under a version of the Act of Oct. 16, 1918, as amended in 1920 and codified at 8 U.S.C. 137, which required present membership in the Communist Party of the United States to be proven. *Id.* at 137-38. However, the hearing officer found that Mr. Bridges was not then a member of the Communist Party of the United States and the charges were dismissed. However, proceedings were reinstituted after the Act of 1918 was amended to cover past membership in the Communist Party of the United States. *Id.* at 138-39.
112. *Bridges*, 326 U.S. at 139-40.
113. *Id.* at 144-45.
114. *Id.* at 154.
115. *Id.*

then held that warrant to deport Mr. Bridges was unlawful and that he should be released.[116]

In *Carlson v. Landon*,[117] the Court addressed the constitutionality of detaining aliens pending the conclusion of deportation proceedings.[118] While noting that the problems of indefinite detention were not present,[119] the Court held that such pretrial detention was appropriate when intended to prevent subversive activities. The Court, however, differentiated such pretrial detentions from detentions based on secret evidence against a resident alien in *Kwong Hai Chew v. Colding*.[120] The issue in *Kwong Hai Chew* involved a resident alien who had sailed on The Sir John Franklin, a merchant vessel, whose home port was New York City.[121] Upon returning from a voyage to the Far East, he was "'temporarily excluded' as an alien whose entry was deemed prejudicial to the public interest,"[122] he sought a writ of habeas corpus in the United States District Court for the Eastern District of New York.[123] The Attorney General instructed that he not be given a hearing and that his status be changed to permanently excluded.[124]

In granting the petitioner's writ of certiorari, the Court limited its review to whether his "detention, without notice of any charge against him and without opportunity to be heard" was constitutional.[125] The Court took notice of the fact that even the aliens possess the rights guaranteed in the Bill of Rights and that they have protections from government encroachment on those rights.[126] That all resident aliens are entitled to such rights is inherent in the document itself and the provision under which he was being detained was not constitutionally applicable to him, thus requiring his release. However, such rights are not extended to persons who have not yet been admitted to the United States.[127]

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116. *Id.* at 157.
117. 342 U.S. 524 (1952), *reh'g denied*, 343 U.S. 988 (1952).
118. *Carlson*, 342 U.S. at 527.
119. *Id.* at 545-46.
120. 344 U.S. 590 (1953).
121. *Id.* at 594.
122. *Id.*
123. *Id.* at 595.
124. *Id.*
125. *Id.* at 595-96. For their purposes, the Court treated Mr. Chew as an alien who had continuously resided in the United States, citing the fact that he had married a citizen, purchased a home, and had applied for naturalization. *Id.* at 596.
126. *Id.* at 597 n.5 (citing *Bridges*, 326 U.S. at 161).
127. *Id.* at 600 (the Court noted that the Attorney General may refuse a hearing to an alien who is excludable and that no constitutional issues arose).

The bright-line distinction between excludable and expulsion was blurred the following month in *Shaughnessy v. United States ex rel. Mezei*.[128] *Mezei* involved the exclusion of an alien who had lived in the United States for 25 years.[129] After being held for almost two years on evidence of such confidential nature that "disclosure . . . would be prejudicial to the public interest," and the government being unable to deport him to any other country, he waited on Ellis Island for some form of relief.[130] Unfortunately for him, his detention happened to fall just subsequent to World War II, a time during which the Court granted the Executive more power in limiting those aliens who may be admitted and the procedures by which to determine their status.[131] In ruling that the government could continue to detain him, the court stated that, "[a]n exclusion proceeding grounded on danger to the national security . . . presents different considerations; neither the rationale nor the statutory authority for such release exists."[132]

Invidious discrimination on the part of the government against an alien, even one whose presence in the United States is unlawful, has been held to be a violation of the protections afforded to her by the Fifth Amendment.[133] This applies whether it is the federal government, under the Fifth Amendment, or a sovereign state, under the Fourteenth Amendment,[134] that must protect an alien's rights. However, the Court again expanded the powers of the government to exclude resident aliens in *Landon v. Plasencia*.[135] *Plasencia* involved the determination of whether exclusion hearings or deportation hearings were appropriate for a resident alien who had been attempting to re-enter the country with the intent of violating immigration laws.[136] The Court reasoned that because she had left the country with a non-innocent purpose, her departure had been "meaningful," and she was thus subject to an exclusion hearing.[137]

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128. 345 U.S. 206 (1953).

129. *Id.* at 208. Mezei had left the country for two years to visit his dying mother in Romania and was detained when he attempted to re-enter the United States (even though he was armed with an immigration visa from the American Consul in Budapest).

130. *Id.* at 208-09.

131. *Id.* at 210-11.

132. *Id.* at 216.

133. Matthews v. Diaz, 426 U.S. 67, 77 (1976); *Wong Wing*, 163 U.S. at 238; *Yick Wo*, 118 U.S. at 369.

134. *See* Plyler v. Doe, 457 U.S. 202, 212-13, 217-18 (1982) (holding that undocumented children were entitled to a free education and law that prohibited such education was unconstitutional as a violation of equal protection); *Wong Wing*, 163 U.S. at 238, 242-43.

135. 459 U.S. 21 (1982).

136. *Id.* at 21 (the respondent had been attempting to smuggle several illegal aliens when she was detained).

137. *Id.* at 30-32. The Court had previously held, in *Rosenberg v. Fleuti*, 374 U.S. 449

IV. *ZADVYDAS V. DAVIS*

Last term, in *Zadvydas v. Davis*,[138] the Court stated that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[139] In *Zadvydas*, the Court considered whether the post-removal statute authorized indefinite detention of aliens or whether such detention was limited to the amount of time "*reasonably necessary* to secure the alien's removal."[140] In reading an implicit limitation into the statute, the Court said that indefinite detention was not permitted.[141]

A. Analysis of Zadvydas

Freedom from government detention is at the core of the Due Process Clause,[142] and detention in a non-criminal setting is only permissible in the rare instance when an individual is determined to be "dangerous-plus."[143] Noting that a deportation hearing is civil, the Court stated that the "special justification" that satisfied this high standard did not apply when an alien had already been ordered removed and the government had been unable to find a country willing to accept her.[144] The Court rejected the government's argument that the statute served to ensure the appearance of the alien at future proceedings without much

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(1963), that a resident alien who visited Mexico for an afternoon had merely had an "innocent, casual, and brief excursion" and thus had not had a "meaningful departure which would have subjected her to "entry." *Rosenberg*, 374 U.S. at 462.

138. 533 U.S. 678 (2001). Kestutis Zadvydas was born to Lithuanian parents in a German "displaced persons camp" in 1948 and immigrated to the United States with his parents in 1956. He had an extensive criminal history, including attempted robbery, burglary, and numerous drug crimes. The INS detained him upon his release from prison on a conviction for selling cocaine and he was subsequently ordered deported to Germany. *Id.* at 684.

139. *Id.* at 682, 690.

140. *Id.* at 682 (emphasis in original). The statute at issue in *Zadvydas* stated that:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of *security* or foreign policy] or [3] 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.

8 U.S.C. § 1231(a)(6) (*Zadvydas*, 533 U.S. at 682 (alteration in original)) (emphasis added). The Court read an implicit limitation into this language even though the statute gave the Attorney General the discretion to detain such persons beyond the removal period.

141. 533 U.S. at 689.

142. *Foucha*, 504 U.S. at 80.

143. *See Jackson*, 406 U.S. at 738 (requiring that more than mere mental illness cause an individual to be a threat to society); *see also Salerno*, 481 U.S. at 746 (detention is permitted in a "criminal proceeding with adequate procedural protections"); *Foucha*, 504 U.S. at 80 (detention is permitted in certain "nonpunitive" instances); *Hendricks*, 521 U.S. at 356 (detention is proper when mental illness causes a person to be a danger to others).

144. *Zadvydas*, 533 U.S. at 690.

discussion, stating that such basis is "nonexistent where removal seems a remote possibility at best."[145] However, the Court acknowledged that the government's second argument – to prevent danger to the community – had been upheld when such detention was limited to especially dangerous individuals and only when there were "subject to strong procedural protections."[146]

The Court observed, in a string cite, that pretrial detention is permissible since there were strict limits on the length of time someone could be held, bail was only denied to those charged with the most dangerous of crimes, the government had the burden to prove dangerousness and the judiciary was given the power to ensure that procedural safeguards were sufficient.[147] Additionally, the government could not shift the burden to the alien to prove "nondangerousness."[148] In upholding detention of aliens that "is of potentially indefinite duration, [the Court] demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that help[ed] create the danger."[149] The Court also took note of the previous approval of temporary detention of aliens while deportation hearings were proceeding in *Carlson v. Landon*.[150]

The Court went on to say that, "[t]he provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say *suspected terrorists*, but broadly to aliens ordered removed for many and various reasons, including tourist via violations."[151] In rejecting the government's argument that they are entitled to detain criminal aliens during removal proceedings and should, thus, be able to continue such detention pending removal, the Court maintained that the statute permitted detention that had "no obvious termination point"[152] and for this reason, adequate procedural protections had to be in place for the statute to adequately protect the rights of aliens.[153] The

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145. *Id.* at 690 (citing Jackson v. Indiana, 406 U.S. at 738, in which the Court held that detention is unconstitutional when it "bears [no] reasonable relation to the purpose for which [she was] committed").

146. *Id.* at 691.

147. *Id.* (citing *Salerno*, 481 U.S. at 747).

148. *Id.* (citing *Foucha*, 504 U.S. at 81-83).

149. *Id.* (citing *Hendricks*, 521 U.S. at 358).

150. 342 U.S. 524, 545-46 (1952). The approval in *Carlson*, however, was premised on the fact that the inherent problems of indefinite detention were not present. *Id.*

151. *Zadvydas*, 533 U.S. at 691 (citing *Hendricks*, 521 U.S. at 368) (emphasis added).

152. *Id.* at 697.

153. *Id.* at 692-95. Here, the government argued, and the Court rejected, that Congress' plenary power to write immigration law and the Executive's plenary power to enforce such law were not subject to the Court's review. The Court instead reminded the government that the plenary powers could only be executed when utilized in permissible ways.

Court opined that the only procedural protections that were in place were in the administrative hearings in which the alien has the burden to prove that she is not dangerous.[154] As stated above, such burden shifting had been held to be inadequate protection by the Court in *Foucha*,[155] and thus the statute presented "serious constitutional problem[s]"[156] that could only be resolved by construing the statute as containing an unexpressed six-month period during which the detention is presumptively constitutional.[157]

B. Applying Zadvydas *to the USA PATRIOT Act*

The *Zadvydas* court delineated the procedural safeguards that must be in place in order to indefinitely detain an alien without violating the rights guaranteed to her by the Due Process Clause. Since immigration hearings are civil in nature, an individual must be determined to satisfy the "dangerous-plus" standard.[158] The Government cannot shift the burden to the alien by asking her to prove that she is not a danger to the community and that she will not likely be removed in a reasonable amount of time.[159] Additionally, the court had ruled that the law was overbroad in that it applied to all kinds of criminals, not merely terrorists.[160]

The amendments made by the USA PATRIOT Act to the INA constitute insufficient procedural protections for aliens subject to removal proceedings. The definition of terrorist referenced in the INA and the federal regulations that govern immigration proceedings does not provide that an alien be convicted of one of the delineated crimes.[161] The Government seems to be able to certify that an alien is a terrorist based on mere allegations that they committed a crime listed or were involved in a group that the has been listed as a terrorist organization.[162] Nowhere in the provisions governing detention of alien terrorists is a trial or hearing

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154. *Id.* at 692.
155. 504 U.S. at 82.
156. *Zadvydas*, 533 U.S. at 692.
157. *Id.* at 701. The presumptive period, however, does not mean that all aliens can be held for six months. It merely means that once that period has expired, the government must produce evidence suggesting that there still remains a "significant likelihood of removal in the reasonably foreseeable future," *Id.*, and that the government would bear a heavier burden in making that required showing. *Id.*
158. *Foucha*, 594 U.S. at 80; *Salerno*, 481 U.S. at 750-51; *Hendricks*, 521 U.S. at 357.
159. *Zadvydas*, 533 U.S. at 691; *Salerno*, 481 U.S. at 747.
160. *Zadvydas*, 533 U.S. at 691.
161. 8 U.S.C. §§ 1227(a)(4) & 1182.
162. 8 U.S.C. § 1182(a)(3)(B).

mentioned to determine, beyond a reasonable doubt, whether the alien actually committed the acts she is accused of.[163]

This cannot be said to an oversight on the part of Congress. Congress made clear its intent to allow for the detention of aliens without a conviction.[164] In 8 U.S.C. § 1227(a)(4), Congress left out the words "*is convicted*" that were written in 8 U.S.C. § 1227(a)(2). In Section 1227(a)(2), the INA expressly provides that an "alien who *is convicted* of a crime involving moral turpitude. . . . And . . . *is convicted* of a [felony] . . .is deportable."[165] By leaving the words "*is convicted*" out of sections 1227(a)(4) and (5), Congress intentionally denied aliens their right to procedural due process. This violation of aliens' due process rights are further harmed by the fact that once an alien is certified as having committed one of the delineated crimes, all discretion that the Attorney General had concerning release of the alien pending removal is removed.[166]

The changes that the USA PATRIOT ACT made to the INA were an underhanded attempt to take advantage of the crisis that the United States was experiencing following the terrorist attacks on September 11th. Furthermore, the regulations that were written to give effect to those changes are in direct violation of the procedures set out by the United States Supreme Court in *Zadvydas*.[167] There are two sections of regulations that were added in response to *Zadvydas* and September 11th,[168] and one section that was amended.[169] The major change made in section 241.4, on its face, ensured the detention of aliens beyond the removal period complied with *Zadvydas*,[170] and referred to one of the new sections which governs the determination of whether the likelihood of removal will be in the reasonably foreseeable future.[171] One of the changes added here concern the definition of the removal period.[172]

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163. *See* 8 U.S.C. § 1182 *et seq*.

164. This assumes, of course, that the congressmen and women actually read the USA PATRIOT Act and conducted a full debate on the costs and benefits of the provisions.

165. 8 U.S. C. § 1227(a)(2) (emphasis added).

166. *See* 8 C.F.R. § 241.14(d)(1) (2001) (requiring that aliens detained under 8 U.S.C. §§ 1182(a)(3) & 1227(a)(4) be held upon the certification of the Attorney General); *see also* 8 U.S.C. § 1231(a)(2) (mandating detention of aliens ordered removed).

167. 533 U.S. at 691-92.

168. Determination of Whether There is a Significant Likelihood of Removing a Detained Alien in the Reasonably Foreseeable Future, 8 C.F.R. § 241. 13 (2001); Continued Detention of Removable Aliens on Account of Special Circumstances, 8 C.F.R. § 241.14 (2001).

169. Continued Detention of Inadmissible, Criminal, and Other Aliens Beyond the Removal Period, 8 C.F.R. § 241.4 (2001).

170. 8 C.F.R. §§ 241.2(b)(4), (g)(1), & (i)(7).

171. 8 C.F.R. § 241.13.

172. 8 C.F.R. § 241.4(g)(1).

This provision sets the date that the time period begins for removal.[173]

Section 241.13 governs the determination referred to above. Interestingly, this section attempts to conform with the time limit imposed by the *Zadvydas* court without making an effort to comply with the circumstances around which the detention is constitutional.[174] Instead of merely providing that a greater showing must be provided by the Government after six months, the regulation provides that no determination as to the likelihood of removal has to even be made during the six month period once the removal period commences.[175] Thus, the time period by which the Government purports to comply with *Zadvydas* does not actually start until an alien has already been detained for a significant amount of time.[176] Furthermore, the alien has the burden to show that there is "no significant likelihood that [she] will be removed in the reasonably foreseeable future."[177] Contrary to the Court's well established precedent in the area of civil detention, this section places the burden on the alien to prove that she will not be removed in the reasonably foreseeable future.[178] An alien is, however, given the opportunity to rebut evidence that the Government will attempt to use to review the alien's request.[179]

The most disturbing rule is found in section 241.14. Specifically, the rule provides that an alien shall be detained, even when she has demonstrated there is no significant chance of being removed in the reasonably foreseeable future, when certain conditions are determined to be present.[180] These condition arise when the alien is one who fits the definitions laid out in section 1182 of the INA, and "the alien's release presents a risk to national security or a significant risk of terrorism; and . . . no conditions of release can . . . avoid the threat."[181] Again, the broad label of terrorist, without the benefit of a trial, is used to detain aliens indefinitely. Significantly, however, the rule does not allow the

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173. 8 C.F.R. § 241.4(g)(1)(i) states that "[t]he removal period for an alien . . . shall begin on the latest of the following dates: (A) the date the order becomes . . . final; (b) if the removal order is subject to judicial review . . . and if the court has ordered a stay of the alien's removal, the date on which, consistent with the court's order, the removal order can be executed and the alien removed." *Id.*

174. 8 C.F.R. § 241.13(a)(2)(ii).

175. *Id.*

176. *See Zadvydas*, 533 U.S. at 684-85.

177. 8 C.F.R. § 241.13(d)(1).

178. *Id.*

179. 8 C.F.R. § 241.13(e)(4).

180. 8 C.F.R. § 241.14(d)(1).

181. 8 C.F.R. §§ 241.14(d)(1)(i)-(iii).

assistance of an attorney to be provided to the alien, even at her own expense.[182]

V. CONCLUSION

The statute at issue in *Zadvydas*,[183] is substantially similar to a section added to the INA in the USA PATRIOT Act.[184] Both are discretionary provisions utilized when the Attorney General, or a person to whom such power is delegated, believes an alien threatens national security. However, no procedural protections are afforded to the alien vulnerable to this subjective determination.

In fact, procedural protections are expressly taken away from any alien subject to removal. An alien is required to bear the burden to prove that there is no reasonable likelihood of removal. Additionally, she is not permitted to have the assistance of an attorney, nor is she ever convicted of a crime. The worst interference with constitutional protections, however, is embodied in the change of the definition of the removal period in such a manner that the six month period imposed by *Zadvydas* does not even begin until after the initial 90-day removal period expires. Hence, an alien can be detained for the entire period during which removal proceedings are taking place and then for another 90 days before the six month period begins to run. Most importantly, and the biggest element of the section 412 that violates *Zadvydas*, is that the detention provided for "has no obvious termination point."[185]

182. 8 C.F.R. § 241.14(d)(2).
183. 8 U.S.C. § 1231(a)(6).
184. USA PATRIOT Act, *supra* note 4, § 412.
185. 533 U.S. at 697.