NO ALIEN LEFT DETAINED? A NOT SO "SPECIALLY DANGEROUS" EXCEPTION TO THE GOVERNMENT'S LIMITED DETENTION AUTHORITY

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INTRODUCTION

The Department of Homeland Security considered Ha Tran too dangerous to release.[1] Tran had a history of mental illness and violence.[2] In 1984, just a little less than a decade after his admission to the United States as a refugee, Tran was convicted of firearm possession and battery against his wife.[3] He served two years in a mental hospital, followed by a six-month stay in a halfway house.[4] One day after his release, he entered the room where his seven-year-old daughter and wife lay sleeping together. Tran approached the bed and stabbed his wife to death.[5]

Tran was nine years into an eighteen- to twenty-year prison sentence for that crime when the Department of Homeland Security ("DHS") took custody of him and initiated removal proceedings.[6] An immigration judge found Tran removable from the United States for his crimes, but, despite a final order for removal, no country would accept Tran, and DHS continued to hold him in its custody under 8 U.S.C. § 1231(a)(6).[7] The Fifth Circuit Court of Appeals, taking its cue from a 2001 Supreme Court decision, *Zadvydas v. Davis*,[8] held in 2008 that DHS's continuing detention of Tran was unconstitutional.[9] Accordingly, it ordered his supervised release back into Louisiana society.[10]

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1 Tran v. Mukasey, 515 F.3d 478, 480 (5th Cir. 2008).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Tran*, 515 F.3d at 480.

8 533 U.S. 678 (2001).

9 *Tran*, 515 F.3d at 484.

10 *Id.* at 485.

Tran's case stands in sharp contrast to that of Thomas Matherly, a U.S. citizen who pleaded guilty to one count of possessing child pornography in violation of federal law.[11] A North Carolina court sentenced Matherly to a forty-one-month prison term and three years of subsequent supervised release.[12] One day prior to Matherly's scheduled release from prison in 2006, however, the federal government flexed its authority under the newly enacted Adam Walsh Child Protection and Safety Act ("Adam Walsh Act")[13] and certified that Matherly was a sexually dangerous individual.[14] This certification stayed Matherly's release from prison pending the completion of procedures to civilly commit him as a sexually dangerous individual under the Adam Walsh Act.[15] The Federal Bureau of Prisons continued to hold Matherly for nearly six years.[16] In March 2012, the U.S. District Court for the Eastern District of North Carolina finally held Matherly's civil commitment hearing and ordered him involuntarily committed as a sexually dangerous person on May 3, 2012.[17]

The difference in how Tran and Matherly fared under the law is nothing short of perverse. While neither man cuts an especially sympathetic figure, it is hard to believe that Congress could have intended for the two coexisting statutory schemes to operate as they did, with Tran going free and Matherly indefinitely confined.

Tran's case now lies at the heart of a circuit split arising out of the attorney general's post-*Zadvydas* regulations concerning continuing post-removal order detentions of "specially dangerous" aliens.[18] While *Zadvydas* established a presumptive six-month limit on detention of an alien who has a final order of removal, subsequent agency regulations interpreting 8 U.S.C. § 1231 after *Zadvydas* set forth an exception for "specially dangerous" aliens who, due to a mental illness in conjunction with criminal conduct, would

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11 Matherly v. Johns, No. 5:11-CT-3020-BR, 2012 WL 4447590, at *1 (E.D.N.C. Sept. 25, 2012). Matherly was one of the five men who eventually challenged the constitutionality of the Adam Walsh Act all the way to the Supreme Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010), as discussed in greater detail in Parts II and III.

12 *Matherly*, 2012 WL 4447590, at *1.

13 Codified in relevant part at 18 U.S.C. §§ 4247-48 (2006).

14 United States v. Comstock, 627 F.3d 513, 517 (4th Cir. 2010).

15 *Matherly*, 2012 WL 4447590, at *1.

16 *See id.*

17 *Id.* at *1 n.1.

18 *Compare* Tran v. Mukasey, 515 F.3d 478, 484 (5th Cir. 2008) (holding that detaining an alien who has been ordered removed and certified as specially dangerous for longer than six months is improper in light of *Zadvydas*), *and* Tuan Thai v. Ashcroft, 366 F.3d 790, 799 (9th Cir. 2004) (same), *with* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1256-57 (10th Cir. 2008) (holding that the attorney general's "specially dangerous" regulation, 8 C.F.R. § 241.14(f), allowing DHS to hold for longer than six months an alien whom Immigration and Customs Enforcement ("ICE") ordered removed is appropriate even after *Zadvydas*).

pose a danger to society if released.[19] The interplay of legislation, rulemaking, and jurisprudence has led the Fifth, Ninth, and Tenth Circuits to apply the Supreme Court's holding in *Zadvydas* regarding 8 U.S.C. § 1231 to the subsequent agency regulations in markedly different ways.[20] While the Fifth and Ninth Circuits each found that the agency's regulations re-interpreting § 1231 were improper and constitutionally suspect in light of *Zadvydas*,[21] the Tenth Circuit singled itself out by upholding the agency's newly narrowed scheme to continue detaining a "narrow class of alien"[22] who are unlikely to be removed but whose release from custody would pose a threat to public safety.[23]

This Comment analyzes the appropriateness and constitutionality of the agency regulation 8 C.F.R § 241.14(f), which provides an exception for the continued detention of a criminal alien whose removal is no longer reasonably foreseeable after six months when that alien is "specially dangerous."[24] Part I of this Comment discusses the statutory and judicial history of 8 U.S.C. § 1231(a)(6), and Part II examines the post-*Zadvydas* agency regulations and procedures for continuing to detain an alien. Part III of this Comment then briefly describes the history of involuntary civil commitment procedures for U.S. citizens and specifically discusses the procedures under and litigation arising out of the Adam Walsh Act. Part IV argues that the post-*Zadvydas* agency regulation to continue detention for specially dangerous aliens provides aliens with due process that is sufficiently comparable to the civil commitment proceedings set forth for U.S. citizens in the Adam Walsh Act; the post-*Zadvydas* regulation is therefore an appropriate and constitutional interpretation of 8 U.S.C. § 1231(a)(6). This Comment concludes that in the future courts should follow the Tenth Circuit's post-*Zadvydas* interpretation of 8 U.S.C. § 1231 and its application of 8 C.F.R. § 241.14.

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19 Zadvydas v. Davis, 533 U.S. 678, 701-02 (2001); *Hernandez-Carrera*, 547 F.3d at 1253; *see* 8 C.F.R. § 241.14(f) (2013).

20 *See supra* note 18.

21 *See generally Tran*, 515 F.3d at 484 (holding that detaining beyond six months an alien whom ICE ordered removed and whom DHS certified as specially dangerous is improper in light of *Zadvydas*); *Tuan Thai*, 366 F.3d at 799 (same).

22 *Tran*, 515 F.3d at 483 (discussing Judge Kozinski's dissent from denial of rehearing en banc in *Tuan Thai*).

23 *See Hernandez-Carrera*, 547 F.3d at 1256-57 (holding that the attorney general's specially dangerous regulation, 8 C.F.R. § 241.14(f), allowing DHS to hold beyond six months an alien whom ICE ordered removed is appropriate even after *Zadvydas*).

24 *See* 8 C.F.R. § 241.14(f) (2013).

I. ESTABLISHING THE PRESUMPTIVE SIX-MONTH LIMITATION ON DETENTION OF CRIMINAL ALIENS UNDER 8 U.S.C. § 1231(A)(6)

As the Tenth Circuit established in *Hernandez-Carrera v. Carlson*,[25] "[w]e need not wrestle long with whether 8 U.S.C. § 1231(a)(6) is ambiguous."[26] Inconsistent application of appropriate detention limitations for aliens has created a situation of considerable ambiguity as to whether, for how long, and in which situations a criminal alien whom the government orders removed may be detained pending actual removal.[27]

In 1952, Congress passed the Immigration Nationality Act ("INA"), which provided in part that once a "special inquiry officer" chosen by the attorney general determined that an alien was removable and issued an order of removal, the Immigration and Naturalization Service ("INS") had to detain the alien pending the removal for a period of up to six months.[28] If, after six months, INS was unable to actually remove the individual, INS had to then release the alien from detention and place him or her in a supervised release program.[29]

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") later eliminated the INA's six-month post-removal order detention limitation. In its place, IIRIRA created a ninety-day "removal period" from the date that an immigration judge issued to a criminal alien an administratively final order for removal.[30] The law contained an ambiguous exception, however. Codified in 8 U.S.C. § 1231(a)(6), the IIRIRA revision stated in part that any criminal alien "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to . . . terms of supervision."[31] Since the law did not specify a

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25 547 F.3d 1237 (10th Cir. 2008).

26 *Id.* at 1245.

27 *Id.*

28 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 242(b)-(c), 66 Stat. 163, 209-10 (repealed 1996). Criminal grounds of removal are codified at 8 U.S.C. § 1227(a)(2) (2006) and include crimes involving moral turpitude and aggravated felonies.

29 Immigration and Nationality Act § 242(c)-(d) (repealed 1996).

30 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 241(a)(1), 110 Stat. 3009-546, -598.

31 *Id.* § 241(a)(6), 110 Stat. at 3009-599 (emphasis added). In 2002, Congress passed the Homeland Security Act, which created the Department of Homeland Security and resulted in a restructuring of the government entities that deal with immigration issues. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. §§ 101-613 (2006)). In part, the Act split the Immigration and Naturalization Service ("INS"), which had been administered under the Department of Justice, into three separate divisions under the new DHS: U.S. Customs and Border Patrol ("CBP"), U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Citizenship and Immigration Services ("USCIS"). *Id.* § 1502; Authority of the Secretary of Homeland Security, 68 Fed. Reg. 10,922 (Mar. 6, 2003) (codified at 8 C.F.R. pts. 1, 2, 103, 239); *see also* Clark v. Martinez, 543 U.S. 371, 374 n.1 (2005) (discussing the

maximum amount of time that the government may detain an alien ordered removed beyond the explicit ninety-day removal period, the government began to rely on this exception as a basis for continuing to detain aliens for (sometimes) prolonged periods of time after an immigration judge issued a final order of removal.[32] This prolonged detention became the subject of many legal challenges.[33]

In 2000, the Supreme Court granted certiorari and consolidated two cases that had created a split between the Fifth and Ninth Circuit Courts of Appeals regarding the issue of prolonged detention under 8 U.S.C. § 1231(a)(6).[34] These cases concerned two immigrants, Kestutis Zadvydas and Kim Ho Ma. INS granted both Zadvydas and Ma status as lawful permanent residents in the United States and then later began removal procedures against them for their respective subsequent criminal convictions.[35]

Despite having final orders of removal for both Zadvydas and Ma from the immigration courts, INS was not able to actually deport either man because of a lack of cooperation or a lack of repatriation agreements with other countries.[36] However, INS continued to detain the men beyond the ninety-day removal period, prompting both men to file petitions for writs of habeas corpus under 28 U.S.C. § 2241.[37] While the Fifth Circuit ultimately held that Zadvydas's detention was constitutional because INS was continuing its efforts to remove him, the Ninth Circuit affirmed the lower court's decision to

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change to immigration entities following the Homeland Security Act of 2002). Congress has never updated the language referring to some of the various immigration entities in the relevant immigration laws so that while the law still speaks of the "Attorney General," as of 2003 this language actually refers to the Secretary of Homeland Security. Authority of the Secretary of Homeland Security, 68 Fed. Reg. at 10,922.

32 *See, e.g.*, Ma v. Reno, 208 F.3d 815 (9th Cir. 2000) (involving an individual whom INS detained beyond the removal period), *vacated sub nom.* Zadvydas v. Davis, 533 U.S. 678 (2001); Yong v. INS, 208 F.3d 1116, 1118 (9th Cir. 2000) (involving an alien who filed a habeas petition to challenge his detention beyond six months following his removal order when the United States had no repatriation agreement with his country); Ho v. Greene, 204 F.3d 1045 (10th Cir. 2000) (addressing the continued detention beyond the removal period of two individuals with final orders of removal who could not be removed due to noncooperation by their native country, Vietnam), *overruled in part by Zadvydas*, 533 U.S. 678; Chi Thon Ngo v. INS, 192 F.3d 390, 392 (3d Cir. 1999) (involving another Vietnamese alien whom INS detained past the period for removal); Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (addressing the continued detention beyond the removal period of a criminal resident alien for whom the immigration court issued a final order of removal when his actual removal did not seem likely), *withdrawn and superseded sub nom.* Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002).

33 *See supra* note 32.

34 *Zadvydas*, 533 U.S. at 686.

35 *Id.* at 684-86. United States Citizenship and Immigration Services ("USCIS") is responsible for granting U.S. citizenship and status as legal permanent residents today. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 246-47 (7th ed. 2012). The power was divested from INS upon its dissolution pursuant to the 2002 Homeland Security Act. *See* Authority of the Secretary of Homeland Security, 68 Fed. Reg. 10,922, 10,922 (Mar. 6, 2003) (restructuring the agencies dealing with various aspects of immigration).

36 *Zadvydas*, 533 U.S. at 684-86.

37 *Id.*

release Ma on the grounds that continuing his detention beyond a "reasonable time" from the statutory removal period was unconstitutional.[38] Because the United States did not have a repatriation agreement with Cambodia—Ma's native country—the court held that his removal was not likely and his detention had therefore surpassed a "reasonable" amount of time beyond the removal period set forth in 8 U.S.C. § 1231(a)(6).[39]

In a 2001 decision, a narrow Supreme Court majority (5-4) vacated both the Fifth and Ninth Circuit decisions as logically deficient and held that § 1231(a)(6) limited an alien's post-removal period of detention to only what was reasonably necessary to effect removal.[40] Citing the need to draw a definitive line even as it acknowledged that individual circumstances make it hard to do so, the Court declared a presumptive six-month limit on post-removal order detention.[41] When, after six months, an alien is able to show that there is not a "significant likelihood of removal in the reasonably foreseeable future," the government has the burden of showing otherwise and must release the alien from detention if unable to do so.[42] The question of continued detention for criminal aliens, however, was far from over.

II. DETERMINING THE BREADTH OF *ZADVYDAS* DETENTION LIMITS

Zadvydas quickly became an important precedent. But even while adjudication of continued detention began to increase throughout the lower courts following *Zadvydas*, the Supreme Court continued to refine the presumptive

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38 *Id.* (quoting Ma v. Reno, 208 F.3d 815, 818 (9th Cir. 2000), *vacated sub nom. Zadvydas*, 533 U.S. 678) (internal quotation marks omitted).

39 *Id.*

40 *Id.* at 689, 702.

41 *Id.* at 701. The Court held that Congress probably did not assume that a ninety-day removal period would actually provide a reasonably sufficient amount of time to effect removal, but because Congress had in the past indicated that detention longer than six months may be unconstitutional, that is where it would draw a line "for the sake of uniform administration." *Id.*

42 *Zadvydas*, 533 U.S. at 701. In *Zadvydas*, the Court drew sharp distinctions between aliens who were already present in the United States and aliens who were inadmissible or who had never been admitted but were granted parole into the country. *Id.* at 682, 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). While the Supreme Court stated in *Zadvydas* that "[a]liens who have not yet gained initial admission to this country would present a very different question," *id.* at 682, it later held that these distinctions did not actually justify applying the statute differently for the different classes of alien. Clark v. Martinez, 543 U.S. 371, 386-87 (2005). The three classes of aliens are

> (1) those ordered removed who are inadmissible under [8 U.S.C.] § 1182; (2) those ordered removed who are 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) those ordered removed who are determined by the Attorney General to be a risk to the community or a flight risk.

Tran v. Mukasey, 515 F.3d 478, 482 (5th Cir. 2008).

six-month limit in its subsequent opinions.[43] While, for example, the Court had narrowly held in *Zadvydas* that its decision applied only to admitted aliens who were lawfully present in the United States with final orders of removal, it later extended the six-month detention limit to apply to inadmissible[44] aliens as well.[45] The Court explained that applying the statutory language differently to the different types of aliens included in the statute with final orders of removal would have the effect of creating a new statute.[46] In *Demore v. Kim*,[47] however, the Court distinguished *Zadvydas* and refused to extend the six-month limit to individuals who were in pre-removal detention proceedings and had not yet been issued a final order of removal.[48] Because pre-removal detention definitively ends whenever the removal proceedings terminate, the Court found that it did not require a presumptive six-month limitation.[49]

Following the Supreme Court's rulings, it was unclear how much room was left for agency interpretation and clarification of 8 U.S.C. § 1231(a)(6).[50] Section A of this Part discusses the attorney general's promulgation of a new regulation regarding continued detention of aliens in light of *Zadvydas*, and Section B explores the appellate courts' conflicting reactions to the new regulation.

A. *A "Specially Dangerous" Exception to* Zadvydas v. Davis

Shortly after *Zadvydas*, the attorney general promulgated amended regulations at 8 C.F.R. §§ 241.13 and 241.14 to address the Supreme Court's

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43 *See Clark*, 543 U.S. at 386-87.

44 An inadmissible alien is one who is not allowed to come to the United States. ALEINIKOFF ET AL., *supra* note 35, at 582. If an alien already present in the United States is found inadmissible, he or she is then removable on inadmissibility grounds. *Id.* The grounds for inadmissibility are set forth in INA § 212 and often overlap with the deportability grounds at INA § 237. *Id.*

45 *See Clark*, 543 U.S. at 386-87 (holding that the *Zadvydas* presumptive six-month limit on detention pursuant to U.S.C. § 1231(a)(6) should be applied to all classes of aliens after all); *see also* Demore v. Kim, 538 U.S. 510 (2003) (deciding that *Zadvydas*'s presumptive six-month limit on detention does not apply to pre-removal order detention).

46 *Clark*, 543 U.S. at 377-78.

47 538 U.S. 510 (2003).

48 *Id.* at 528-31.

49 *Id.* at 518-21, 527-28. The Court also distinguished this from *Zadvydas*, noting that the government has an interest in assuring that aliens subject to removal proceedings appear at their hearings and proceedings; detention was a legitimate way to ensure this. *Id.* In *Zadvydas*, this was no longer a legitimate interest because all of the removal proceedings against the alien had already terminated with a final order of removal. *Id.* at 527 (citing Zadvydas v. Davis, 533 U.S. 678, 690 (2001)).

50 *See supra* note 18.

concerns as to the ambiguity and overly broad reach of § 1231(a)(6) as it was written.[51]

Subsection 1 of this Section discusses the Court's language in *Zadvydas* which the attorney general used as a basis for further clarification through his amended regulatory scheme. Subsection 2 sets forth the specific exceptions carved out of 8 U.S.C. § 1231(a)(6) by the amended regulations. Lastly, Subsection 3 provides a detailed analysis of the procedures required under the amended regulations to continue detaining a criminal alien beyond six months.

1. The Attorney General's Basis for Amending Federal Regulations After *Zadvydas*

While the Supreme Court created a definitive line at a six-month detention period in *Zadvydas*, it did so "for the sake of uniform administration [of the statute] in the federal courts," and expressly indicated that there was room for exceptions to this presumptive limitation.[52] Citing *Kansas v. Hendricks*,[53] an earlier decision regarding various state civil commitment proceedings for sexually dangerous predators, the Court stated that "where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint,'" such continued detention could be justifiable.[54]

Section 1231(a)(6) lacked justification "at least," the Court noted, "as administered."[55] Discrediting the provision's rationale, which the government claimed was meant to protect communities from dangerous individuals, the Court responded that:

> [W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.[56]

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51 *See Zadvydas*, 533 U.S. at 696-99 (discussing Congress's ambiguous language in § 1231(a)(6)); *see also* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,968 (Nov. 14, 2001) [hereinafter Continued Detention] (codified at 8 C.F.R. pts. 3, 241) (explaining why the attorney general was propounding new regulations).

52 *Zadvydas*, 533 U.S. at 700-01.

53 521 U.S. 346 (1997).

54 Zadvydas, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356).

55 *Id.*

56 *Id.* at 690-91 (citations omitted). In addition to claiming community safety as a justification for § 1231(a)(6), the government also stated a desire to ensure appearance at removal proceedings as a purpose behind the statute. *Id.* at 690. The Court noted that this justification becomes a moot point once there

The broad nature of § 1231(a)(6) created a catchall situation prior to the *Zadvydas* decision. Under § 1231(a)(6), aliens could be detained for prolonged periods of time pending removal for any number of offenses, even tourist visa violations.[57] As Professor David Cole explained, "In [IIRIRA] . . . Congress mandated detention of all aliens charged with having committed 'aggravated felonies,' a term of art in immigration law that sweeps far more broadly than it sounds, and encompasses even some misdemeanors."[58] Following *Zadvydas*, the attorney general propounded amended regulations to respond to concerns as to the breadth of § 1231(a)(6) which the Supreme Court raised in its decision.[59]

On November 14, 2001, the attorney general issued an immediately effective "good cause" interim rule that added 8 C.F.R. § 241.13 and § 241.14.[60] The first addition was meant to clarify procedures for INS to determine

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is a final order of removal and it no longer appears that the government would be able to effect the alien's removal at all. *Id.*

57 *Id.* at 691. Criminal grounds for removal are codified at 8 U.S.C. § 1227(a)(2) and include crimes involving moral turpitude and aggravated felonies. While a full discussion of the offenses as a basis for removal is outside the scope of this Comment, in short, it is possible for an aggregation of petty offenses to constitute felonies that would justify removal. *See, e.g.*, 8 U.S.C. § 1231(b)(3)(B) ("[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime."). It is this type of problem that preoccupies the Supreme Court in *Zadvydas*.

58 David Cole, *In Aid of Removal: Due Process Limitations on Immigration Detention*, 51 EMORY L.J. 1003, 1006 (2002).

59 *See* Notice of Memorandum, 66 Fed. Reg. 38,433, 38,433-34 (July 24, 2001) (memorializing the attorney general's July 19, 2001, memorandum to INS requesting new regulations to address the Supreme Court's concerns in *Zadvydas*); *see also* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1245 (10th Cir. 2008) ("The Attorney General promulgated 8 C.F.R. § 241.14 in response to the Supreme Court's holding in *Zadvydas*, in order to provide for the continued detention of limited classes of aliens in a manner comporting with constitutional requirements."); Continued Detention, *supra* note 51, at 56,968-69 (explaining why the attorney general was circulating these new regulations for comments).

60 Continued Detention, *supra* note 51, at 56,968-69. When there are persuasive reasons to effectuate a law quickly, the issuing agency may cite "good cause" as to why it is in the public's benefit to do so. *A Guide to the Rulemaking Process*, OFFICE OF THE FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Sept. 14, 2013). An interim rule based on good cause has the effect of a final rule and goes into effect as of the specified date of publication without going through the proposed rule and public commenting stages. However, the issuing agency still accepts comments on the interim rule and may amend the interim rule if public comments would justify doing so. *Id.* 8 C.F.R. § 241.14 went into effect in this way, as an interim rule. On January 5, 2005, the secretary of homeland security and attorney general together published a series of final rules in the Federal Register that, in part, transferred authority for the special circumstance determinations and procedures under 8 C.F.R. § 241 generally from the attorney general to the secretary of homeland security through DHS, pursuant to the Homeland Security Act of 2002. *See* Execution of Removal Orders, 70 Fed. Reg. 661, 674-75 (Jan. 5, 2005) (codified at 8 C.F.R. pts. 241, 1240, 1241); *see also* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. §§ 101-613 (2006)).

whether an alien's removal is significantly likely within the reasonably foreseeable future.[61] The second section, § 241.14, sets forth "special circumstances" that would enable INS to continue detaining an alien ordered removed even when the individual's removal is not significantly likely within the reasonably foreseeable future.[62]

2. The Nature of the Specially Dangerous Detention Provisions

The § 241.14 provision that the attorney general added after *Zadvydas* established four situations that would constitute "special circumstances" and thereby justify possible continued detention beyond the six-month presumptive limit: (1) if an alien has a "highly contagious disease that is a threat to public safety"; (2) if an alien's release would have considerable adverse foreign policy consequences or would (3) pose a significant national security or terrorism risk; or (4) if an alien is "specially dangerous."[63] The "specially dangerous" provision, § 241.14(f), is the subject of this Comment.

The attorney general adopted a three-part test to determine whether an alien removed on criminal grounds can be considered a "specially dangerous" alien subject to possible prolonged detention.[64] An alien may be classified as specially dangerous only if:

> (i) The alien has previously committed one or more *crimes of violence* as defined in 18 U.S.C. 16; (ii) Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and (iii) No conditions of release can reasonably be expected to ensure the safety of the public.[65]

Acknowledging the Supreme Court's assertion that due process has always protected an individual's "freedom from bodily restraint" attributable to "arbitrary government action,"[66] the attorney general concurrently instituted a broad procedural scheme designed to offer protections to any alien subject to a § 241.14(f) classification.[67]

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61 Continued Detention, *supra* note 51 at 56,968-69.

62 *Id.*

63 8 C.F.R. § 241.14(b)-(d), (f) (2012) (emphasis omitted).

64 *See id.* § 241.14(f)(1).

65 *Id.* (emphasis added). Per the U.S. Code, a crime of violence is defined as any crime that (1) includes the use, attempt, or threat of physical force against an individual or property of another; or (2) is a felony that inherently involves a "substantial risk" that physical force will be exerted against another individual or property in the course of commission. 18 U.S.C. § 16 (2006).

66 Continued Detention, *supra* note 51, at 56,974 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

67 8 C.F.R. § 241.14(a)(2), (f)-(k).

3. The Procedural Process to Declare an Alien "Specially Dangerous" Under 8 C.F.R. § 241.14(f)

The process to continue detaining an alien under the regulations' specially dangerous provision involves the participation of three executive branch departments: DHS, the Department of Justice ("DOJ"), and the Department of Health and Human Services ("HHS").[68] Under the DOJ, immigration judges and the Board of Immigration Appeals[69] have jurisdiction to determine whether an alien poses a special danger to the public.[70] In order to initiate proceedings to show that an alien meets the specially dangerous requirements that would justify continued detention beyond the *Zadvydas* limitation, DHS must first state in writing that an alien's release would pose a danger to the public under § 241.14(f)(1).[71] Before proceeding, a government-designated physician from, or approved by, HHS must conduct a complete medical and psychiatric evaluation of the alien.[72] Afterward, DHS may then file a Notice of Referral to the immigration judge in the court with jurisdiction over the alien, which is based on detention location.[73] The Notice of Referral must state the basis for initiating specially dangerous proceedings and any relevant evidence, such as behavior.[74] DHS must also notify the alien in writing that the federal government is commencing specially dangerous proceedings against him or her and must inform him or her of the nature and mechanics of the procedures.[75] DHS must further provide the alien with written notice of his or her rights for the entire process, including during the merits hearing and reasonable cause hearing.[76]

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68 Thai v. Ashcroft, 389 F.3d 967, 969 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

69 Immigration judges and the Board of Immigration Appeals are administered through the Executive Office for Immigration Review ("EOIR") under the Department of Justice and the attorney general. ALEINIKOFF ET AL., *supra* note 35, at 253-60. The immigration courts are thus administratively separate from the agency enforcing immigration laws, DHS. *Id.* at 254 (discussing the 1983 Department of Justice decision to extract its immigration judges from INS, now dissolved and administered in component parts by DHS, in order to provide more structural integrity of immigration adjudication).

70 8 C.F.R. § 241.14(a)(2).

71 *Id.* § 241.14(f)(2).

72 *Id.* § 241.14(f)(3).

73 *Id.* § 241.13(g)(1).

74 *Id.*

75 *Id.* § 241.14(g)(2).

76 8 C.F.R. § 241.14(g)(3).

a. *The Reasonable Cause Hearing*

An immigration judge must hold a reasonable cause hearing for an alien within ten days of DHS filing a Notice of Referral.[77] If the judge determines, based upon the evidence submitted, that there is reasonable cause to proceed with a merits hearing, then DHS may continue to detain the alien in question pending completion of the full proceedings.[78] Unless by delay due to the alien, agreement between the parties, or "exceptional circumstances" making it impossible to do so, the immigration judge's decision must be issued within five days of the proceedings.[79] If DHS wants to appeal a dismissal of the specially dangerous proceedings to the Board of Immigration Appeals, it must preserve its right to do so through a Notice of Appeal within two days of the immigration judge's decision.[80] While the government has the burden of proof on appeal, the alien does not have a right of appeal at this stage of the process.[81]

A pending government appeal will stay the immigration judge's order to dismiss the proceedings until the Board of Immigration Appeals issues a decision, which means DHS will continue to detain the alien during the interim.[82] The Board of Immigration Appeals must render decisions in these appeals within twenty days of the Notice of Appeal.[83] If the Board of Immigration Appeals does not dismiss the case at this point, the procedures require a merits hearing within thirty days, if the alien requests.[84]

b. *The Merits Hearing and Rights of Appeal*

During the merits hearing, the government has the burden of proving through clear and convincing evidence that the alien's release from detention would pose a special danger to the public.[85] Unlike in the reasonable cause hearing, either the alien or the government may appeal the immigration judge's decision following the merits hearing to the Board of Immigration Appeals, though the time for the government to file a Notice of Appeal is

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77 *Id.* § 241.14(h)(1). Under this provision, the alien retains the right to request that the hearing be continued, but the government does not. *Id.*

78 *Id.* § 241.14(h).

79 *Id.* § 241.14(h)(3).

80 *Id.* § 241.14(h)(4).

81 *Id.*

82 8 C.F.R. § 241.14(h)(4)(i). If DHS does not file its appeal within the regulatory period, then the judge's order for release takes effect and DHS may no longer continue detaining the alien. *Id.* Similarly, if DHS waives its right of appeal at the time of the hearing, the immigration judge's order for release takes immediate effect. *Id.*

83 *Id.* § 241.14(h)(4)(ii).

84 *Id.* § 241.14(h)(4)(i), (iii).

85 *Id.* § 241.14(i)(1).

notably limited to five days from the date of the decision.[86] Similar to the reasonable cause hearing, however, an appeal of the immigration judge's decision-on-the-merits hearing will automatically suspend the immigration judge's order and continue the alien's detention pending resolution or dismissal of the appeal by the Board of Immigration Appeals.[87]

If either the immigration judge or Board of Immigration Appeals ultimately finds that an alien falls within the "specially dangerous" category under 8 C.F.R. § 241.14(f)(1), the attorney general's provisions for regular periodic review of the alien's case will apply.[88] The attorney general designed these regulations to regularly track the alien's mental well-being to determine if there are any newly available and appropriate alternatives to continuing to detain the individual.[89] An alien may also request reviews of his or her continued detention at most once every six months from a prior decision of an immigration judge or the Board of Immigration Appeals if he or she believes a "material change in circumstances" has occurred.[90] However, the burden is upon the alien to establish any such change in that instance.[91] Each time DHS determines that the public safety requires continuing detention of an alien following a periodic review, DHS must provide the alien with its written decision and any evidence upon which it relied in making the determination.[92] DHS must also notify the alien of his or her right to move to set aside any prior review proceedings before the immigration judge.[93] If the immigration judge grants a set-aside for prior review proceeding results based on a belief that a material change in circumstances may justify releasing the alien from custody, the attorney general's regulations require a new merits hearing for the alien.[94] After exhausting these administrative procedures, aliens may file writs of habeas corpus to the federal district courts.[95]

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86 *Id.* § 241.14(i)(4). While the regulation does not explicitly allow the alien to appeal to the BIA, the default for the alien's right of appeal in removal proceedings is thirty days from the immigration judge's oral decision or receipt of the written decision if no oral decision is issued. *See* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK, 1283-84 (13th ed. 2012); EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, OMB NO. 1125-0002, NOTICE OF APPEAL FROM A DECISION OF AN IMMIGRATION JUDGE (2012), *available at* http://www.justice.gov/eoir/eoirforms/eoir26.pdf.

87 8 C.F.R. § 241.14(i)(4)(i).

88 *Id.* § 241.14(k)(1).

89 *Id.* Aliens who are determined not to fall within this category are to be released from custody by DHS under supervised conditions subject to review by the immigration judge or Board of Immigration Appeals. *Id.* § 241.14(j).

90 *Id.* § 241.14(k)(2)-(4).

91 *Id.* § 241.14(k)(4).

92 *Id.* § 241.14(k)(5).

93 8 C.F.R. § 241.14(k)(5).

94 *Id.* § 241.14(k)(6)(i).

95 *See* Zadvydas v. Davis, 533 U.S. 678, 687-88 (2001).

c. *Alien Rights in Specially Dangerous Detention Proceedings*

All proceedings under 8 C.F.R. § 241.14 are recorded and maintained in a file with all relevant testimony and documents.[96] DHS must provide any alien undergoing § 241.14 proceedings "a list of free legal services providers" at the outset,[97] but the alien may retain any legal counsel so long as whomever he or she chooses is "at no expense to the Government."[98] During both the reasonable cause and merits hearings, the immigration court must provide an alien an interpreter if one is needed, and the alien must have a "reasonable opportunity" to review evidence against him or her, provide any contrary evidence on his or her own behalf, and cross-examine any government witnesses.[99] During the merits hearing, the alien also has the right to cross-examine any government experts.[100]

B. *The "Specially Dangerous" Provision Meets Mixed Reviews*

Following *Zadvydas*, a series of cases arose throughout the federal district courts wherein criminal aliens with final orders of removal challenged their continued detention beyond six months as unconstitutional under *Zadvydas*.[101] In all three cases discussed below, the government argued in defense of the attorney general's revised agency regulations that allowed for continued government detention of certain aliens.[102] A split among the courts of appeals developed as to this "specially dangerous" exception to 8 U.S.C. § 1231(a)(6).

Subsection 1 of this Section discusses the case law that held the § 241.14(f) regulation was improper, while Subsection 2 looks at the alternative view of the Tenth Circuit upholding the attorney general's interpretation.

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96 8 C.F.R. § 241.14(g)(4).

97 *Id.* § 241.14(g)(3)(i).

98 *Id.* While the liberty interest at stake is not inherently the same, it is notable that these aliens' rights, including the right to counsel, mirror the rights provided in standard removal procedures under 8 U.S.C. § 1229a.

99 8 C.F.R. § 241.14(g)(3)(ii)-(iii).

100 *Id.* § 241.14(g)(3)(iii)-(iv).

101 *See* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1246-56 (10th Cir. 2008); Tran v. Mukasey, 515 F.3d 478, 480 (5th Cir. 2008); Tuan Thai v. Ashcroft, 366 F.3d 790, 792 (9th Cir. 2004).

102 *See Hernandez-Carrera*, 547 F.3d at 1256-57; *Tran*, 515 F.3d at 481; *Tuan Thai*, 366 F.3d at 792.

1. Courts Finding that the Specially Dangerous Provision Is Improper

In its 2004 decision, *Tuan Thai v. Ashcroft*,[103] the Ninth Circuit became the first circuit court to hold that the attorney general's amended regulations were inappropriate in light of *Zadvydas*.[104] The Executive Office for Immigration Review ("EOIR") ordered Thai, a criminal alien, removed for his numerous aggravated felony convictions.[105] Neither party contested the validity of Thai's removal order or the fact that there was no significant likelihood of Thai's removal in the reasonably foreseeable future.[106] Rather, Thai only challenged his continued detention beyond the six-month period as contrary to the Supreme Court's ruling because there was no significant likelihood of his removal within the reasonably foreseeable future.[107]

In upholding the lower court's decision to release Thai from custody, the Ninth Circuit construed *Zadvydas* to bar his continued detention because Thai's case did not implicate any national security concerns, which essentially conflated the regulatory provision at issue with a separate provision for national security threats at 8 C.F.R. § 241.14(d).[108] Rejecting the government's counterargument, the court then went on to state that "[a]n alien's ill mental health coupled with dangerousness cannot justify indefinite detention under *Zadvydas* when dangerousness alone cannot justify such detention."[109]

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103 366 F.3d 790 (9th Cir. 2004). In his dissent from the Court's denial of a rehearing en banc, Judge Kozinski notes that the government indicated there were four other individuals similarly situated to Thai who would also be affected by the decision. Thai v. Ashcroft, 389 F.3d 967, 972 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

104 *Tuan Thai*, 366 F.3d at 792. Though this was the first time the Ninth Circuit so held after *Zadvydas*, the ruling is notably consistent with the Ninth Circuit's earlier order to release Kim Ho Ma, a decision that was affirmed by the Supreme Court in *Zadvydas*. Zadvydas v. Davis, 533 U.S. 678, 702 (2001).

105 *Tuan Thai*, 366 F.3d at 792.

106 *Id.* The former INS granted Thai, a Vietnamese citizen, status as a legal permanent resident in 1996. *Id.* However, following Thai's fast-developing record of aggravated felony convictions, INS took custody of Thai upon his release from prison and found him removable in 2002. *Id.* Unable to enact Thai's removal without a repatriation agreement or cooperation from Vietnam, INS did not release him after six months, but instead commenced 8 C.F.R. § 241.14(f) proceedings to continue his detention as a specially dangerous individual. *Id.* Thai filed a petition for a writ of habeas corpus in the U.S. District Court for the Western District of Washington, D.C., and was ordered released from custody, a decision the government appealed. *Id.* at 792-93.

107 *Id.* at 792, 794.

108 *Id.* at 796. The court's holding seems to misapprehend the government's argument that Thai should be detained because he posed a threat to the community. *See id.* While the court responds by stating that Thai's crimes did not rise to the level of a national security threat, the attorney general had promulgated a wholly different classification and procedure for continued detention of aliens ordered removed who posed national security threats at 8 C.F.R. § 241.14(d). *Id.*

109 *Id.* at 798 (citing Zadvydas v. Davis, 533 U.S. 678, 708 (2001) (Kennedy, J., dissenting)). The Fifth Circuit also stated that to allow for such an exception would be contrary to what the Supreme Court

This directly countered the *Zadvydas* majority's acknowledgment that a "dangerousness rationale" must be coupled with a "special circumstance, such as mental illness" to justify "potentially *indefinite*" detention.[110] As one of the first post-removal continued detention cases reaching the circuit courts after *Zadvydas*, the Ninth Circuit's *Thai* opinion itself became precedential in conjunction with *Zadvydas*.[111]

Four years later, in *Tran v. Mukasey*,[112] the Fifth Circuit looked to *Zadvydas* and relied upon the Ninth Circuit's holding in *Thai* when it granted Ha Tran's habeas petition and ordered his release.[113] The Fifth Circuit held that § 1231(a)(6) did not authorize Tran's continued detention in light of the Supreme Court's decision and pointed to the "constitutional concerns" such a detention would raise.[114] Borrowing the Ninth Circuit's logic, the Fifth Circuit interpreted a negative right instead of a positive right, claiming that the *Zadvydas* holding did not state what the government is allowed to do under § 1231(a)(6) (construe a series of "special circumstance" exceptions), but rather emphasized what it was *not* allowed to do (continue detaining an alien beyond six months).[115]

2. The Judicial Outlier: Finding that the Specially Dangerous Provision Is Proper

Less than ten months after the Fifth Circuit's decision in *Tran*, the Tenth Circuit split from its sister circuits in *Hernandez-Carrera v. Carlson*, when it held that continued detention for aliens whom DHS determines are specially dangerous under the 8 C.F.R. § 241 regulations is appropriate and constitutional.[116] *Hernandez-Carrera*, like the Supreme Court's decision in

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accomplished in *Clark v. Martinez*, 543 U.S. 371 (2005), because such an exception creates a category of aliens who are treated differently. Tran v. Mukasey, 515 F.3d 478, 485 (5th Cir. 2008). This Author disagrees with this reading of *Clark*. Rather than creating a special category of aliens subject to different treatment, the attorney general's amended provisions would apply to any of the three types of aliens identified in § 1231(a)(6) who meet the criteria set forth in 8 C.F.R. §§ 241.13-.14.

110 *Zadvydas*, 533 U.S. at 691 (citing Kansas v. Hendricks, 521 U.S. 346, 358, 368 (1997)).

111 *See Tran*, 515 F.3d at 483 (referring to the *Thai* opinions).

112 515 F.3d 478 (5th Cir. 2008).

113 *Id.* at 482-83.

114 *See Tran*, 515 F.3d at 483-84; *see also Zadvydas*, 533 U.S. at 702.

115 *Tran*, 515 F.3d at 483 ("[T]he language cited by the Government as creating a 'harm-threatening mental illness' exception was *not* a description of the scope of the Government's authority under § 1231(a)(6)." (emphasis added) (quoting Tuan Thai v. Ashcroft, 366 F.3d 790, 794 (9th Cir. 2004))).

116 In addition to considering the constitutionality of 8 C.F.R. § 241.14(f) itself, the Tenth Circuit heavily considered whether the attorney general had the authority at all to propound 8 C.F.R §§ 241.13 and 241.14 in the aftermath of *Zadvydas* based on administrative law principles. Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1245-51 (10th Cir. 2008). The Fifth Circuit also raised the administrative question in *Tran v. Mukasey* and ultimately decided that the attorney general's amended regulations were unau-

Zadvydas, involved two aliens—both Cuban citizens—whom INS paroled into the United States and then later found excludable due to their respective crimes of moral turpitude.[117] A state court convicted Hernandez-Carrera of "rape with force and bodily injury," then later of "battery and indecent exposure."[118] Following Hernandez-Carrera's jail sentence, INS took custody of him, during which time a physician for the Federal Bureau of Prisons diagnosed him with schizophrenia.[119]

Hernandez-Arenado had a background similar to Hernandez-Carrera, including a conviction for sexual assault of a seven year-old boy.[120] He additionally admitted to committing hundreds of acts of pedophilia and, as he saw nothing wrong with his behavior, was uncooperative in treatment efforts.[121] DHS alleged that both men were public dangers because of the nature of their respective conditions (schizophrenia and pedophilia) and continued to retain the men in its custody beyond six months with no likelihood of their removal pursuant to procedures under 8 C.F.R. § 241.14(f)-(k).[122]

The Tenth Circuit reasoned that the limited authority granted to the attorney general under 8 U.S.C. § 1231(a)(6) in conjunction with the post-*Zadvydas* regulation revisions that improved procedural protections and evidentiary standards provided sufficient due process to aliens.[123] The court looked to the Supreme Court's discussion of limits on individual liberty interests within the civil context in *Kansas v. Hendricks* and reiterated that such interests could be subverted to legitimate government interests in "special

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thorized following *Zadvydas*. 515 F.3d at 484 (discussing why the courts should not afford *Chevron* deference to the attorney general's regulations). The court in *Hernandez-Carrera* decided differently under a *Chevron* and *Brand-X* framework of administrative law principles. 547 F.3d at 1250-51 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). The issue of administrative law, while inherently a part of the circuit split, is not within the scope of this Comment. This Comment focuses on the "more serious question . . . presented as to whether the agency's construction of § 1231(a)(6), as implemented in 8 C.F.R. § 241.14, is a 'permissible' one." *Id.* at 1245. For a detailed analysis of the administrative law principles involved in this issue, compare *Hernandez-Carrera*, 547 F.3d 1237, and Kathleen L. Cassidy, Note, *Indefinite Detention of Specially Dangerous Removable Aliens:* Hernandez-Carrera v. Carlson *and the Importance of Agency Deference*, 79 U. CIN. L. REV. 1517 (2011) (arguing the superiority of the Tenth Circuit's understanding of administrative law in connection with the attorney general's authority to propound amended regulations in light of *Zadvydas*), with Brandon L. Phillips, Note, *Questioning the Supremacy of the Supreme Court:* Hernandez-Carrera v. Carlson *and the Tenth Circuit's Justification for Indefinite Detention Under the* Brand X *Framework*, 96 IOWA L. REV. 1099 (2011) (challenging the Tenth Circuit's application of administrative law principles in the competing statutory interpretations surrounding 8 C.F.R. § 241.14(f)).

117 *Hernandez-Carrera*, 547 F.3d at 1242.

118 *Id.* at 1243.

119 *Id.*

120 *Id.*

121 *Id.* at 1243, 1255.

122 *Id.* at 1243-44.

123 *Hernandez-Carrera*, 547 F.3d at 1251 (citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997)). At issue in *Hendricks* was Kansas's civil commitment proceedings for sexually dangerous predators.

and narrow circumstances."[124] The court then noted the attorney general's 2001 amended and additional provisions at 8 C.F.R. § 241.14 "directly respond[ed]" to the Supreme Court's concerns in *Zadvydas* by allowing continued detention for only a narrow group of aliens representing a "'small segment of . . . individuals' whose release would particularly endanger the public's health or safety."[125] These changes, the court found, bring the interpretation of § 1231(a)(6) in line with *Zadvydas* and are thereby constitutionally sound.[126]

Though the court's opinion in *Hernandez-Carrera* was novel as a majority, the Tenth Circuit's logic itself was not without precedent.[127] Its arguments echoed those of Judge Kozinski's dissent from his denial of rehearing en banc in *Thai v. Ashcroft* in 2004.[128] Joined by four other judges in the Ninth Circuit, Judge Kozinski pointed out that the attorney general effectively narrowed his own authority into conformity with *Zadvydas* through his revised and added regulations, including 8 C.F.R. § 241.14.[129] The changes created much stronger procedural protections for aliens and narrowed the group of aliens who could be detained for longer than six months to a "small segment of particularly dangerous individuals."[130] In so doing, the court stated that the

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124 *Id.* (quoting Zadvydas v. Davis, 533 U.S. 678, 690 (2001)) (internal quotation marks omitted).

125 *Id.* at 1253 (quoting *Hendricks*, 521 U.S. at 368).

126 *Id.*

127 Nor would it be the last time this logic was employed. In 2010, the U.S. District Court for the District of Maryland (within the Fourth Circuit) heard a case with nearly identical facts to those of *Tuan Thai*, *Tran*, and *Hernandez-Carrera*. *See* Marquez-Coromina v. Hollingsworth, 692 F. Supp. 2d 565 (D. Md. 2010). Presented with all three precedents in the briefs, and without a directly parallel precedent in its own circuit, the court adopted the reasoning in *Hernandez-Carrera* and upheld the use of 8 C.F.R. § 241.14 to justify continued detention for a narrowed class of specially dangerous individuals. *Id.* at 573-74.

128 389 F.3d 967, 969-71 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc). But for the unique composition and procedure in the Ninth Circuit, the five dissenting judges would have been only one vote away from the majority needed to grant the requested rehearing in *Thai*. Given the large size of the Ninth Circuit (28 active judges), "full" en banc panels consist of eleven acting justices, requiring six votes for a majority in order to rehear a case. 9TH CIR. R. 35-1; *see also Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003: Hearing on H.R. 2723 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 49 (2003) [hereinafter Kozinski Statement] (statement of Alex Kozinski, Judge, Ninth Circuit Court of Appeals). However, even though only eleven judges sit on a rehearing panel, every active judge votes on whether or not to hear a case, making it extremely difficult to gain a majority vote to be granted rehearings en banc and drawing criticism of the Ninth Circuit and even calls for splitting the Circuit. *See Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 109th Cong. 181-84 (2005) [hereinafter *Revisiting Proposals*] (statement of Sidney R. Thomas, Judge, Ninth Circuit Court of Appeals); Kozinski Statement, *supra*.

129 *Thai*, 389 F.3d at 968 (Kozinski, J., dissenting from denial of rehearing en banc).

130 *Id.* at 968-69 (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997)) (internal quotation marks omitted).

attorney general maintained a proper interpretation of *Zadvydas*, and the majority's holding in *Thai*, Kozinski stated, thereby "seriously undermines" the executive's plenary power within the sphere of immigration.[131]

III. CIVILLY COMMITTING U.S. CITIZENS

The federal government has a long history of regulating the civil commitment of dangerous and mentally ill federal prisoners upon the expiration of their criminal sentences under 18 U.S.C. §§ 4241(d), 4246, and 4243(d).[132] Since 1949, 18 U.S.C. § 4246 has provided for the post-sentence detention of federal prisoners whose dangerousness is exacerbated by their concurrent suffering from some form of mental illness.[133]

This Part focuses generally on the Adam Walsh Act. This Act, while dealing specifically with sexually dangerous predators, reconfirms and expands upon prior precedents regarding the judicially ordered civil commitment of U.S. citizens in federal custody.[134] The actual procedures to commit an individual under the Adam Walsh Act, which are discussed in Section B, offer a useful and updated look at involuntary civil commitment at the federal level for U.S. citizens. As the Supreme Court noted, "Aside from its specific focus on sexually dangerous persons, § 4248 [of the Adam Walsh Act] is similar to the provisions first enacted in 1949. . . . [I]t is a modest addition to a longstanding federal statutory framework, which has been in place since 1855."[135]

Section A of this Part discusses the recent Supreme Court jurisprudence regarding the validity of state and federal statutes that provide for the involuntary civil commitment of sexually dangerous individuals. Section B lays out the relevant civil commitment provisions of the Adam Walsh Act, and Section C sets forth the Supreme Court's refutations to the major arguments raised against federal and state involuntary civil commitment programs.

A. *The Development of Civil Commitment Jurisprudence*

In 1997, the Supreme Court decided a landmark case with several parallels to the § 241.14(f) cases that have more recently appeared before the courts of appeals.[136] In *Kansas v. Hendricks*, the Court ruled that a state's

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131 *Id.* at 967.

132 *See* United States v. Comstock, 130 S. Ct. 1949, 1961 (2010).

133 *Id.*

134 *Id.*

135 *Id.* (citation omitted).

136 *See* Kansas v. Hendricks, 521 U.S. 346 (1997).

civil commitment proceedings for "sexually violent predators" were constitutionally sound.[137] While acknowledging the importance of an individual's liberty interest in being free from physical restraint, the Court qualified the interest, noting that it was not and had never been absolute, and could be subverted to a legitimate state interest in the public's welfare under proper procedures and sufficient evidentiary standards.[138] *Hendricks* represented a culmination of civil commitment cases in U.S. history and itself became a hallmark precedent upon which the lower courts and the Supreme Court alike would rely in the future.[139] Both the Tenth Circuit and Judge Kozinski, in his *Thai* dissent, cited *Hendricks* in support of their respective § 241.14(f) opinions, while the Fifth and Ninth Circuits made no mention of *Hendricks* at all in their respective opinions in *Tran* and *Tuan Thai*.[140]

More than a decade later, the Supreme Court also referred back to its decision in *Hendricks* when deciding *United States v. Comstock*.[141] The *Comstock* case involved a statute that essentially created a federal version of the state civil commitment scheme at issue in *Hendricks*: the Adam Walsh Child Protection and Safety Act of 2006.[142] Under this Act, individuals in the Federal Bureau of Prisons' custody whom the attorney general shows to be "sexually dangerous" are subject to civil commitment until they are no longer a risk.[143] Congress created the statute in part to address the problem of states' general unwillingness to "assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of lengthy federal incarceration, no longer has any substantial ties to [a] State."[144] The individuals challenging the suit decried the Adam Walsh Act as beyond the scope of federal power and a violation of their due process rights.[145]

While the *Comstock* Court upheld the federal government's authority to enact the Adam Walsh Act's civil commitment program under the Constitution's Necessary and Proper Clause, it actually deflected the due process

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137 *Id.* at 351, 356-57 (internal quotation marks omitted).

138 *Id.* at 356-57.

139 *See id.* (discussing prior civil commitment precedents set by the Supreme Court, including *Addington v. Texas*, 441 U.S. 418, 426-27 (1979), and *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

140 *Compare* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1251-53 (10th Cir. 2008) (discussing the *Hendricks* Court's assertions that an individual's liberty interest is not absolute, and that prolonged detention may be appropriate in a civil context for a narrow group of especially "dangerous individuals"), *and* Thai v. Ashcroft, 389 F.3d 967, 968, 970 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc), *with* Tran v. Mukasey, 515 F.3d 478 (5th Cir. 2008), *and* Tuan Thai v. Ashcroft, 366 F.3d 790 (9th Cir. 2004).

141 United States v. Comstock, 130 S. Ct. 1949, 1954 (2010).

142 Pub. L. No. 109-248, 120 Stat. 587 (codified in relevant part at 18 U.S.C. §§ 4247-48 (2006)).

143 *Comstock*, 130 S. Ct. at 1973 (Thomas, J., dissenting).

144 *Id.* at 1969 (Alito, J., concurring in the judgment).

145 *Id.* at 1956 (majority opinion).

questions raised regarding the federal program altogether.[146] Citing to *Hendricks* and *Addington v. Texas*,[147] the Court stated "we assume . . . that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances."[148] Instead, the Court remanded this lingering issue back down to the Fourth Circuit, which had *also* deflected the issue earlier by holding that the federal government did not have the authority to enact such a law.[149] On remand, the Fourth Circuit reversed the district court's decision and upheld the Adam Walsh Act as constitutional on due process grounds.[150] The Supreme Court has since denied Comstock's petition for certiorari to appeal the Fourth Circuit's decision.[151]

B. *The Civil Commitment Process Under the Adam Walsh Act*

The Adam Walsh Act provides for an individual's civil commitment through an interplay of 18 U.S.C §§ 4247 and 4248. As summarized by the Supreme Court in *Comstock*, the Act

> allows a district court to order the civil commitment of an individual who is currently "in the custody of the [Federal] Bureau of Prisons," if that individual (1) has previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) currently "suffers from a serious mental illness, abnormality, or disorder," and (3) "as a result of" that mental

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146 *Id.*

147 441 U.S. 418 (1979).

148 *Comstock*, 130 S. Ct. at 1956.

149 *Id.* at 1965; United States v. Comstock, 627 F.3d 513, 514-15 (4th Cir. 2010).

150 *See Comstock*, 130 S. Ct. at 1965; *Comstock*, 627 F.3d at 514-15, 524-25.

151 Comstock v. United States, 131 S. Ct. 3026 (2011), *denying cert. to* 627 F.3d 513. *Comstock* actually involved five cases of similarly situated individuals: Graydon Comstock, Marvin Vigil, Thomas Matherly, Markis Revland, and Shane Catron. *Comstock*, 627 F.3d at 516. While the district court did not formally consolidate the cases, the Fourth Circuit consolidated the actions in 2007. Order, *Comstock*, 627 F.3d 513 (No. 07-7671). The court treated each case identically, and the pleadings in each matter were also nearly identical, so the litigation in the individual cases tracked the progression of *Comstock* as the leading case. *Comstock*, 627 F.3d at 517. Having found on remand from the Supreme Court that the due process argument was without merit, the Fourth Circuit further remanded the case back down to the District Court for the Eastern District of North Carolina for additional proceedings. *Id.* at 525. Ultimately, the district court found that the government failed to show that Comstock satisfied the criteria to be classified as a sexually dangerous person under 18 U.S.C. § 4248 and ordered his release. *See* United States v. Comstock, No. 5:06–HC–2195–BR, 2012 WL 1119949, at *1 (E.D.N.C. Apr. 3, 2012) (discussing the district court's Nov. 30, 2011, statement that the government failed to show that Comstock met "the criteria for commitment as a sexually dangerous person under 18 U.S.C. § 4248" and ordering his release); *see also* United States v. Revland, Civil Action No. 5:06–HC–02212, 2011 WL 6749814, at *6-7 (E.D.N.C. Dec. 23, 2011) (holding that the government failed to prove by clear and convincing evidence that Revland was a "sexually dangerous" person as understood by the statute). *But see* Matherly v. Johns, 427 F. App'x 257 (4th Cir. 2011) (denying appellate review of the District Court's decision on remand to reject Matherly's petition for a writ of habeas corpus in light of the extensive litigation involved in *Comstock*).

> illness, abnormality, or disorder is "sexually dangerous to others," in that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released."[152]

If an individual is in the Federal Bureau of Prisons' custody, the attorney general and anyone he authorizes may commence civil commitment proceedings against the individual by first sending a certification that the individual is sexually dangerous to the court clerk from the district where the person is detained.[153] The clerk must then notify the individual and the government attorney, and the court must order a hearing to determine the sexually dangerous status ("the hearing").[154] The attorney general's certification will, in the meantime, automatically stay any pending release of the individual in question until the civil commitment proceedings are completed.[155]

Prior to the hearing, the court may order a psychiatric or psychological evaluation of the individual, or both on some occasions.[156] The individual may request his or her own examiner in addition to the court-appointed examiner.[157] The individual is also entitled to legal counsel—at the government's expense if necessary—for the hearing, during which the individual can testify, present evidence and witnesses on his or her behalf, and cross-examine witnesses.[158] The evidentiary standard for the hearing under the Adam Walsh Act is clear and convincing evidence.[159]

If the court finds that an individual is a sexually dangerous person at the close of the hearing, he or she is not automatically remanded to a federal facility.[160] It is the attorney general's primary duty to first see if any state (usually the state where the person was domiciled or tried) will bear the responsibility for committing the individual in a state program like that seen in *Hendricks*.[161] If no state will take custody of the individual, the attorney general must then commit the individual to "a suitable facility."[162]

While commitment in a mental health facility under Adam Walsh Act proceedings can continue indefinitely, the Act sets forth several provisions for review of an individual's mental health conditions and for an individual's

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152 *Comstock*, 130 S. Ct. at 1954 (alteration in original) (citations omitted) (citing 18 U.S.C. §§ 4248, 4247(a)(5)-(6) (2006)).

153 18 U.S.C. § 4248(a). Per the Bureau of Prisons' regulation propounded under the authority of the Adam Walsh Act, the Bureau of Prisons may certify that an individual in its custody is sexually dangerous when a review under the propounded regulations gives rise to "reasonable cause" to believe he or she is sexually dangerous. 28 C.F.R. § 549.90 (2012).

154 18 U.S.C. § 4248(a).

155 *Id.*

156 *Id.* §§ 4247(b), 4248(b).

157 *Id.* § 4247(b).

158 *Id.* § 4247(d).

159 *Id.* § 4248(d).

160 18 U.S.C. § 4248(d).

161 *Id.*

162 *Id.* The Act defines a suitable facility as "a facility that is suitable to provide care *or* treatment given the nature of the offense and the characteristics of the defendant." *Id.* § 4247(a)(2) (emphasis added).

discharge.[163] First and foremost, if a state ever decides to assume responsibility for the individual at any time, the attorney general must remand the individual to state custody.[164]

In addition, if at any time the director of the facility finds that an individual is either not at all sexually dangerous or has reached a point where a medically supervised release would be sufficient to manage the individual's behavior, then the court may order that the individual be released or conditionally released.[165] To that end, the director of a facility where an individual is committed under the Adam Walsh Act must provide the court and any other party that the court commands with annual reports attesting to the individual's current state of mental health and to the need for continued commitment.[166]

If the director of the mental health facility ever determines that the individual's mental health status would justify a release from commitment, the director must certify that release in writing to the clerk of the court that ordered the individual committed.[167] The court may then either order the individual's discharge, or if the government requests, grant an additional hearing as to whether release would be appropriate.[168] If at the close of the second hearing the court finds by the preponderance of the evidence that the individual is not going to be sexually dangerous under an unconditional release—or if the individual's dangerousness could be kept under control by a conditional medically supervised release—then the court must order whichever release is appropriate.[169]

If a facility director does not certify that an individual committed under Adam Walsh Act proceedings is a candidate for discharge, the individual may also, at any time during commitment, request a new hearing as often as every 180 days from the court's previous decision.[170] The committed individual's right to habeas relief is also explicitly preserved by the Adam Walsh Act, and he or she may file a petition for a writ of habeas corpus at any time.[171]

Additional administrative regulations further clarified the civil commitment process pursuant to 18 U.S.C. §§ 4247 and 4248 as enacted by the Adam Walsh Act.[172] The Bureau of Prisons's director, under authority dele-

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163 *Id.* § 4247(d).

164 *Id.* § 4248(d)(1).

165 *See id.* §§ 4247(e)(1), 4248(d)(1).

166 18 U.S.C. § 4247(e)(1).

167 *Id.* § 4248(e).

168 *Id.* The court must hold this additional hearing per the provisions set forth in 18 U.S.C. § 4247(d).

169 *Id.* § 4248(e).

170 *Id.* § 4247(h).

171 *Id.* § 4247(g).

172 *See* 28 C.F.R. §§ 549.90-.95 (2012).

gated from the attorney general, circulated a series of proposed rules in August 2007, a little over a year after Congress passed the Adam Walsh Act.[173] Following a series of notice and comment rulemaking, the director then propounded the regulations as a final rule in November 2008.[174] These regulations in part set forth the purpose and application of civil commitment of a sexually dangerous person and clarified the statutory definitions for "sexually dangerous person," "sexually violent conduct," "child molestation," "sexually dangerous to others," and factors for determining "serious difficulty in refraining from sexually violent conduct or child molestation if released."[175]

C. *Let's Be Civil: The Major Arguments Against Civil Commitment*

Critics of involuntary civil commitment's legality generally argue that it involves a subpar evidentiary standard and that the procedures used to commit an individual violate that individual's due process rights under the Constitution.[176] These contentions are really two prongs of one greater and often repeated argument—that civil commitment schemes smack of criminal proceedings.[177] The Supreme Court, however, has consistently rejected these arguments.[178]

While the Court in *Hendricks* acknowledged that a proceeding cannot be made civil simply by attaching a "civil" label to it, it also affirmed that

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173 Civil Commitment of a Sexually Dangerous Person, 73 Fed. Reg. 70,278 (Nov. 20, 2008) (codified at 28 C.F.R. pt. 549).

174 *Id.*

175 *Id.* at 70,280-81 (internal quotation marks omitted).

176 *See, e.g.*, Whitney Chelgren, Comment, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1492-93 (2011); *see also* Kansas v. Hendricks, 521 U.S. 346, 364 (1997) (discussing Hendricks's argument that the procedural safeguards in place in the Kansas Sexually Violent Predator law render the proceedings criminal in nature and thereby require a higher burden of proof); Addington v. Texas, 441 U.S. 418, 427 (1979) (citing petitioner's brief arguing that a clear-and-convincing evidentiary standard was not high enough for a case of indefinite civil commitment); United States v. Comstock, 627 F.3d 513, 519-20 (4th Cir. 2010) (discussing respondent's argument that the clear-and-convincing-evidence standard is not appropriate for all elements of the Adam Walsh Act).

177 *See, e.g.*, Brief for Respondent, *Hendricks*, 521 U.S. 364 (Nos. 95-1649, 95-9075), 1996 WL 528985, at *14-17. In addition to the procedural argument is the criticism that civil detention conditions themselves are indistinguishable from criminal detention.

178 *See* United States v. Comstock, 130 S. Ct. 1949 (2010) (assuming without deciding that a federal civil commitment program for sexually dangerous individuals is constitutional as to due process concerns based on prior Supreme Court decisions in *Hendricks* and *Addington*); *Hendricks*, 521 U.S. at 364 (upholding a state's civil commitment program as having constitutional due process and evidentiary standards); *Addington*, 441 U.S. at 433 (establishing that a "clear and convincing" evidentiary standard was appropriate for civil commitment proceedings (internal quotation marks omitted)).

commitment proceedings such as those provided for under Kansas's "sexually violent predator" statute *are* civil in nature and not solely in name.[179] What differentiates the civil from the criminal is whether the proceedings are punitive in nature and/or intent.[180] The Supreme Court pointed to the fact that the individuals who are civilly committed are not "subject to punitive conditions" when civilly committed under the Kansas Act[181] and stated further that:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and . . . is not punitive.[182]

The Court rejected arguments that including elements of criminal procedure renders the civil commitment proceedings criminal in nature.[183] The court stated that the decision to include "procedural safeguards" (ranging from juries to government provided counsel, etc.) or to maintain more than a clear-and-convincing-evidence standard was not an indication of criminal proceedings.[184] Rather, it was a testament to the "great care" with which a state legislature crafted its civil commitment procedures so that they would apply only to a "narrow class of particularly dangerous individuals" and involve strong procedural protections before denying anyone freedom from confinement.[185]

The *Hendricks* Court also referred back to its decision in *Addington*, where it first held that a state did not have to prove beyond a reasonable doubt that an individual suffered from a mental illness and required commitment for the public and personal safety of that individual.[186] Rather, it explained, a

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179 *Hendricks*, 521 U.S. at 361, 363 ("Although we recognize that a 'civil label is not always dispositive,' we will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" (alterations in original) (citation omitted) (quoting Allen v. Illinois, 478 U.S. 364, 369 (1986); United States v. Ward, 448 U.S. 242, 248-49 (1980)).

180 *See, e.g.*, *id.* at 361.

181 *Id.* at 363.

182 *Id.* at 368-69.

183 *Id.* at 364-66.

184 *Id.* at 364-65.

185 *Hendricks*, 521 U.S. at 364-65.

186 Addington v. Texas, 441 US. 418, 428-31 (1979). *Addington* involved the indefinite commitment of a mentally ill defendant under a Texas mental health statute. *Id.* at 420-22. The use of the clear-and-convincing evidentiary standard for civil commitment proceedings was upheld again in *Hendricks*, 521 U.S. at 357.

clear-and-convincing evidentiary standard was appropriate for civil commitment proceedings.[187] This lower evidentiary standard is a subject of great controversy.[188]

Critics have also stated that the potentially indefinite nature of civil commitment and inconsistent requirements or standards as to mental health treatment during commitment render the process punitive in nature.[189] While Hendricks, for example, argued that his confinement's potentially indefinite nature demonstrated punitive intent, the Court pointed out that the duration simply fulfilled the objectives behind committing an individual to begin with: to detain the individual until his or her condition no longer renders him or her a threat to others.[190] "If detention for the purpose of protecting the community from harm *necessarily* constituted punishment," the Court stated, rebuffing the claim, "then all involuntary civil commitments would have to be considered punishment. But we have never so held."[191]

Where the question of mental health treatment during commitment was concerned, however, the Court proceeded more cautiously by qualifying its position on the necessity of providing mental health treatment. Inadequate treatment provisions embedded within the state scheme led to the oft-repeated characterization of civil commitment proceedings as "disguised punishment."[192] But even while setting forth a justification for the questionable psychological treatment provided to Hendricks, the Court maintained that such treatment was not *always* necessary, even in cases of potentially indefinite civil commitment.[193] "While we have upheld state civil commitment statutes that aim both to incapacitate and to treat," the Court wrote, "we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others."[194]

The question whether such civil commitment acts should require treatment proved one of the more divisive issues for the Court and occupied much

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187 *Addington*, 441 US. at 427-33.

188 *See, e.g.*, Ryan K. Melcher, Note, *There Ain't No End for the "Wicked": Implications of and Recommendations for § 4248 of the Adam Walsh Act After* United States v. Comstock, 97 IOWA L. REV. 629, 654-56 (2012).

189 *See, e.g.*, Andrew Bramante, Note, *Ending Indefinite Detention of Non-Citizens*, 61 CASE. W. RES. L. REV. 933, 965-66 (2011) (arguing that the specially dangerous detention proceedings raise due process concerns because of the liberty interest that is at stake in conjunction with the proceedings occurring at an administrative level instead of before an Article III judge); Phillips, *supra* note 116, at 1117-18 (arguing that continued detention pursuant to the 8 C.F.R. § 241.14 specially dangerous provision is essentially punitive).

190 *Hendricks*, 521 U.S. at 363-64.

191 *Id.* at 363.

192 *Id.* at 365.

193 *Id*. at 365-67. The Court called for perspective before laying too harsh a judgment upon the Kansas treatment program because Hendricks was "the first person committed under the Act," and not all of the "treatment procedures [were] in place." *Id.* at 367-68.

194 *Id.* at 366 (citation omitted).

of Justice Breyer's dissent, which three additional justices joined either in part or in whole.[195] The majority did not ignore this factor. In addressing the lower court's determination that "[t]reatment with the goal of reintegrating [the committed individual] into society is incidental, at best," to the Kansas statute,[196] the majority nevertheless included treatment as an integral factor to determine whether the civil commitment scheme was punitive in nature.[197] The *Addington* majority too, as one of its justifications for the clear and convincing evidentiary standard in civil commitment proceedings, stated that a higher standard could potentially "impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment."[198]

The distinction the majority drew in support of the statute at issue in *Hendricks* was that it acknowledged that sometimes there are no cures for mental disease.[199] Even if treatment was only ancillary to the statute's purpose, a civil commitment act did not have to absolutely cover the treatment of individuals committed under its procedures in all circumstances.[200] The majority sought to avoid a situation in which a state would have to release an individual who could not be treated, even if that individual was both mentally ill and dangerous.[201] The absence of available treatment in the cases of untreatable diseases itself should not undermine the State's ability to civilly commit an individual who poses a danger to the public.[202] According to one expert, for example, there is "no cure for pedophilia."[203] But lack of cure would not render an individual diagnosed with pedophilia *and* with a history of indulging his or her impulses any less of a public danger.[204] Harkening to another example in support of its position, the majority pointed out the legitimacy of involuntarily and indefinitely confining an individual who poses a public health risk due to an "untreatable, highly contagious disease."[205]

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195 *Id.* at 378, 381-391 (Breyer, J., dissenting). Justice Breyer couches his discussion of the treatment as a substantive due process issue within his discussion of the Ex Post Facto Clause debate in Part II of his dissent. *Id.* at 378.

196 *Hendricks*, 521 U.S. at 365 (majority opinion) (quoting *In re* Care & Treatment of Hendricks, 912 P.2d 129, 136 (Kan. 1996), *rev'd*, *Hendricks*, 521 U.S. 346).

197 *Id.* at 365-69.

198 Addington v. Texas, 441 US. 418, 432 (1979).

199 *Hendricks*, 521 U.S. at 366 ("[I]t would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment exist[s]."). As there was a "meager" provision in effect in connection with the Kansas Act in particular, however, the Court held that this was further evidence in support of the fact that the civil commitment program at issue was not actually punitive in nature. *Id.* at 367-68.

200 *Id.* at 366.

201 *Id.*

202 *Id.*

203 Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1255 (10th Cir. 2008).

204 *Id.*

205 *Hendricks*, 521 U.S. at 366. The attorney general actually provided for this particular scenario of highly contagious disease separately within the amended § 241.14 regulations at § 241.14(b).

IV. "SPECIALLY DANGEROUS" DETENTION VERSUS INVOLUNTARY CIVIL COMMITMENT

When compared to the involuntary civil commitment procedure invoked under the Adam Walsh Act, the detention provided for by 8 C.F.R § 241.14(f)-(k) under 18 U.S.C. § 1231(a)(6) does not appear as constitutionally suspect as the Fifth and Ninth Circuits portrayed. Section A of this Part addresses the various due process concerns that the specially dangerous provision invokes and argues that these concerns are unwarranted and not constitutionally problematic. Section B further argues that upholding the specially dangerous provision is a better public policy decision.

A. *Specially Dangerous Proceedings Under 8 C.F.R. § 241.14(f) Provide an Appropriate Level of Due Process to Aliens*

There are several due process concerns that are implicated by the continued detention scheme for specially dangerous aliens under the attorney general's regulations.[206] Subsection 1 of this Section compares the issues associated with the procedural process of classifying an individual as specially dangerous for the purpose of detaining him or her for longer than six months. Subsection 2 discusses the more substantive criticisms regarding due process raised in connection with the specially dangerous proceedings: the administrative nature of the proceedings and the lack of mental health treatment for individuals.

1. Comparing Specially Dangerous and Adam Walsh Civil Commitment Proceedings

The "specially dangerous" regulations for detaining an alien beyond the six-month period developed an extensively detailed procedure for continuing an individual's detention in light of *Zadvydas*.[207] As Judge Kozinski pointed out in his dissent from the denial of rehearing en banc in *Thai*, the Supreme] Court "said nothing about how the statute is to be construed in situations where the alien is given the procedural protections it found missing in *Zadvydas*."[208] In light of the procedural protections included in the specially dangerous proceedings at 8 C.F.R. § 241.14 (f)-(k), the regulations are a constitutional interpretation of 8 U.S.C. § 1231(a)(6) even after *Zadvydas*.

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206 *See, e.g.*, *Hernandez-Carrera*, 547 F.3d at 1254-56 (discussing the "substantive and procedural due process challenges" to the attorney general's § 241.14 regulation).

207 *See* 8 C.F.R. § 241.14(f)-(k) (2012).

208 Thai v. Ashcroft, 389 F.3d 967, 970 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

Though the attorney general promulgated the 8 C.F.R. § 241.14(f)-(k) procedures to continue detaining specially dangerous aliens five years before Congress passed the Adam Walsh Act, the procedures actually closely track the Adam Walsh Act's civil commitment procedures, beginning with initiation of the procedures.[209] Both the Adam Walsh Act and 8 C.F.R. § 241.14(f) require that the party overseeing an individual's detention certify in writing that the individual is sexually or specially dangerous; this writing commences the respective proceedings to civilly commit or continue detaining that individual.[210] Additionally, in both instances, any such certification will have the effect of staying the individual's prison term or detention pending completion of the respective proceedings.[211] Where the procedures do *not* align is often—though not always—due to some *added* procedural protection for aliens undergoing detention proceedings for which there is no corresponding Adam Walsh Act provision.

For example, while DHS must order a mental health evaluation of the subject alien, the federal government does not have a parallel obligation when certifying sexual dangerousness.[212] The Adam Walsh Act actually provides that the government *may* order such an evaluation but does not indicate that it *shall* do so.[213] Notably, however, while the Adam Walsh Act does not require the government to obtain a mental health evaluation for an individual subject to commitment (though it is hard to imagine why it would not choose to do so), the individual is given a statutory right to select his or her own expert to conduct an evaluation, even in addition to any government-appointed professional.[214] This right is not extended to an alien undergoing § 241.14(f) proceedings.[215]

Once DHS commences continued detention proceedings against an alien, it must provide a list of free legal service providers to the alien but is not obliged to undertake the cost of the alien's defense.[216] The federal government *is* obligated to appoint counsel to an Adam Walsh defendant, however, if counsel is requested and financially necessary.[217] The hearings under both

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209 *Compare* 18 U.S.C. §§ 4247-48 (2006), *with* 8 C.F.R. § 241.14(f)-(k).

210 *See* 18 U.S.C. § 4248(a); 8 C.F.R. § 241.14(f)(2).

211 *See* 18 U.S.C. § 4248(a); 8 C.F.R. § 241.14(h).

212 *Compare* 18 U.S.C. § 4248(b), *with* 8 C.F.R. § 241.14(f)(3).

213 *See* 18 U.S.C. § 4248(b).

214 *Id.* § 4247(b).

215 *See* 8 C.F.R. § 241.14(f)-(k).

216 *Id.* § 241.14(g)(3)(i). Per the same provision, the alien may also obtain his or her own counsel as long as it is not at the government's expense.

217 18 U.S.C. § 4247(d). In Thomas Matherly's case, when an Adam Walsh Act defendant requested the government provide him counsel, the court stated, "[T]he in forma pauperis statute merely authorizes a court to 'request' that an attorney represent a plaintiff. A court cannot force an attorney to accept an appointment under the statute." Matherly v. Johns, No. 5:11-CT-3020-BR, 2012 WL 4447590, at *3 (E.D.N.C. Sept. 25, 2012) (citation omitted).

provisions provide individuals an opportunity to testify, cross-examine government witnesses, and present evidence on their behalf.[218]

A major difference between the respective hearings under Adam Walsh and specially dangerous proceedings under 8 C.F.R. § 241.14(f) is that for DHS to continue detaining an individual under the specially dangerous provision requires a two-hearing process.[219] While an individual who is certified as sexually dangerous under the Adam Walsh Act is entitled to a hearing to determine his or her dangerousness and candidacy for involuntary civil commitment, there seems to be a built-in regulatory presumption of doubt against the DHS specially dangerous certifications.[220] Before an alien subject to continued detention proceedings can even have a merits hearing, the immigration judge must first conduct a "reasonable cause hearing" to determine if the specially dangerous certification has merit.[221] While the alien at issue has greater rights in the merits hearing than in the reasonable cause hearing (only the government may appeal a decision from the reasonable cause hearing), the reasonable cause hearing stands as an extra level of procedural protection for the alien and places the burden of proof on the government.[222] Even with this difference, the evidentiary standard for both the merits hearing and the single Adam Walsh hearing is clear and convincing evidence.[223] The similarities between these detention and commitment proceedings extend even further than their respective hearings.

Under both the Adam Walsh Act and the federal regulations, once an individual has been found sexually/specially dangerous and committed/ detained, there are provisions to ensure periodic review of the individual's case.[224] If the individual's circumstances ever change so that he or she may be conditionally released under supervision or unconditionally released, then DHS or the Bureau of Prisons must pursue those options.[225] The individual, in both instances, may also request additional reviews of his or her case every 180 days from a prior determination.[226]

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218 *See* 18 U.S.C. § 4247(d); 8 C.F.R. § 241.14(g)(3)(iii).

219 *See* 8 C.F.R. § 241.14(h), (i).

220 An important criticism by the *Zadvydas* Court was that the statute, as interpreted, placed the burden of proof on the alien to show that he or she was not dangerous. Zadvydas v. Davis, 533 U.S. 678, 691-92 (2001).

221 8 C.F.R. § 241.14(h), (i).

222 *Id.* § 241.14(h).

223 *See* 18 U.S.C. § 4248(d); 8 C.F.R. § 241.14(i)(1).

224 *See* 18 U.S.C. §§ 4247(e), 4248(e); 8 C.F.R. § 241.14(k).

225 *See* 18 U.S.C. § 4248(e); 8 C.F.R. § 241.14(k)(5)-(6).

226 *See* 18 U.S.C. § 4247(h); 8 C.F.R. § 241.14(k)(2)-(6).

2. Additional Concerns Regarding the Specially Dangerous Detention Exception

A standing criticism of the specially dangerous proceedings is that they occur at an administrative level with no Article III judge, even though an individual's liberty interest is at stake.[227] While the specially dangerous proceedings are held before the immigration courts and the Board of Immigration Appeals, this is appropriate because the majority of decisions involving immigration at least *begin* at this level, the regulations include built-in procedural protections for aliens, and aliens then have a right to file a petition for a writ of habeas corpus to a federal district court.

The immigration courts have a level of expertise in deciding immigration issues that is absent in the Article III courts of general jurisdiction,[228] which renders them better equipped to adjudicate immigration detention cases in a way that will consistently apply the body of immigration law. As the Supreme Court even pointed out in *Zadvydas*, the executive's immigration expertise underlies the "serious administrative needs and concerns inherent in the necessarily extensive [DHS] efforts to enforce this complex statute."[229]

Keeping cases out of the federal courts of general jurisdiction in their preliminary stages allows the immigration courts to sift through less complex cases and preserve judicial resources.[230] As Alaska Senator Lisa Murkowski stated before the Senate Subcommittee on Administrative Oversight and the Courts in 2006, the immigration caseload before the Ninth Circuit alone increased by 463 percent in the single year from 2004 to 2005, which contributed to "delays in the circuit."[231] Ultimately, however, the narrow majority's holding in *Zadvydas* wrests authority from the executive branch in immigration matters, "an area within its peculiar authority."[232]

While the specially dangerous proceedings do begin in the administrative courts, the process—in addition to including a host of procedural protections—is ultimately subject to review in the federal district courts. Upon the

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227 *See, e.g.*, Bramante, *supra* 189, at 965-66 (arguing that holding specially dangerous detention proceedings in an administrative setting, rather than before an Article III judge, raises due process concerns because of the liberty interest at stake); *see also* Phillips, *supra* note 116, at 1117-18 (arguing that continued detention pursuant to the specially dangerous provision of 8 C.F.R. § 241.14 is essentially punitive).

228 *See* Zadvydas v. Davis, 533 U.S. 678, 700 (2001) (acknowledging the "greater immigration-related expertise of the Executive Branch" that is manifested in the immigration courts and Board of Immigration Appeals, and recognizing the nation's "need to 'speak with one voice'" on immigration).

229 *See id.*

230 *See, e.g.*, *Revisiting Proposals*, *supra* note 128, at 9-10 (statement of Lisa Murkowski, Senator from Alaska).

231 *Id.* at 10.

232 Thai v. Ashcroft, 389 F.3d 967, 967 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

conclusion of the 8 C.F.R. § 241.14(f)-(k) administrative proceedings, the alien maintains the right to file a petition for a writ of habeas corpus to an Article III judge challenging his or her continued detention, as practically evidenced in *Tran*, *Thai*, and *Hernandez-Carrera*.[233]

Another major difference between involuntary civil commitment proceedings under the Adam Walsh Act and the continued detention proceedings under 8 C.F.R. § 241.14(f) which draws criticism is the end result. Under the Adam Walsh Act, the end result is an individual being committed, ostensibly for mental health treatment; conversely, there is no correlative treatment provision required by the regulations for an immigration detainee, who may be held indefinitely.[234] Interestingly, however, the Supreme Court in *Hendricks*—which was cited heavily in *Zadvydas*, and later in *Comstock*—consistently refers to the civil commitment as detention.[235]

As the Court pointed out in *Hernandez-Carrera v. Carlson*, though mental health treatment is not required in the specially dangerous procedures, aliens detained under 8 C.F.R. § 241.14(f) are not necessarily or statutorily denied opportunities for treatment either.[236] In fact, many aliens undergoing specially dangerous detention procedures are offered treatment and are simply uncooperative, which in turn becomes a contributing factor to assessing or reaffirming their "dangerousness" based on the idea that refusing to cooperate with treatment renders an individual more likely to be uncontrollable if released into society.[237]

Also, as discussed in Section C of Part III, the Supreme Court noted that it was unclear that treatment would always be required as a justification for continuing to detain an individual whose mental health was compromised and who may pose a danger to society as a result.[238] Still, as the Tenth Circuit

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233 *See* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1244 (10th Cir. 2008) (noting that "[b]oth aliens filed petitions for a writ of habeas corpus"); Tran v. Mukasey, 515 F.3d 478, 479, 484 (5th Cir. 2008) (noting that "Tran filed a petition for writ of habeas corpus"); Tuan Thai v. Ashcroft, 366 F.3d 790, 792 (9th Cir. 2004) (observing that "Thai filed a habeas petition in the District Court"); *see also Zadvydas*, 533 U.S. at 688. Individuals detained under the Adam Walsh Act also have the right to petition for writs of habeas corpus, even though all proceedings for commitment under the Act occur before an Article III judge from the outset. 18 U.S.C. § 4247(g) (2006).

234 *Compare* 18 U.S.C. § 4248(d), *with* 8 C.F.R. § 241.14(f)-(k) (2012).

235 *See* United States v. Comstock, 130 S. Ct. 1949, 1961 (2010) (referring to an individual's civil commitment as detention); Kansas v. Hendricks, 521 U.S. 346, 353 (1997) (same).

236 *Hernandez-Carrera*, 547 F.3d at 1254-55 ("Mr. Hernandez-Arenado had refused to take part in group therapy and continued to reject treatment because of his 'deep seated belief that his [pedophilic] actions are not inappropriate.'" (alteration in original)).

237 *See, e.g.*, *id.* at 1243-44; *Tuan Thai*, 366 F.3d at 799 n.6 ("After oral argument, the Government transferred Thai, *over his objections*, to Columbia, South Carolina for mental treatment." (emphasis added)).

238 *Supra* Part III.C.

stated, absent any proof that the federal government would plainly deny mental health treatment to any alien who requested it, the regulations cannot be understood "as rejecting the possibility of treatment for detained aliens."[239]

While the Supreme Court in *Zadvydas* acknowledged that due process applies for all individuals on U.S. soil whether or not they are here legally or temporarily, it also pointed out that the "nature of that protection may vary depending upon status and circumstance."[240] As Justice Scalia cautioned in his *Zadvydas* dissent (joined by Justice Thomas),

> A criminal alien under final order of removal who allegedly will not be accepted by any other country in the reasonably foreseeable future claims a constitutional right of supervised release into the United States. This claim can be repackaged as freedom from "physical restraint" or freedom from "indefinite detention," but it is . . . a claimed right of release into this country by an individual who *concededly* has no legal right to be here.[241]

While the Supreme Court further argued that it "found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention" of criminal aliens,[242] the Court identified that exact intent in the context of involuntary civil commitment proceedings in its opinion in *Comstock*.[243] It is hard to imagine that Congress would approve of coexisting schemes that would allow for the release of an individual like Ha Tran while committing indefinitely a citizen such as Thomas Matherly. While neither man is entirely sympathetic, the result is logically perverse.

As discussed in Part III, the Supreme Court has repeatedly upheld involuntary commitment procedures such as those used in the Adam Walsh Act as sufficiently satisfying due process concerns.[244] The procedures that the attorney general put in place to allow for the continued detention of specially dangerous aliens are not only similar to those used in the Adam Walsh Act but are extensive and narrowly tailored in their own right.[245] This extensiveness and narrow tailoring follows what the *Zadvydas* Court called for in its criticism of 8 U.S.C. §1231(a)(6) as it was applied prior to 2001. Under certain "special and 'narrow'" cases where "some other special circumstance,

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239 *Hernandez-Carrera*, 547 F.3d at 1255.

240 Zadvydas v. Davis, 533 U.S. 678, 694 (2001).

241 *Id.* at 702-03 (Scalia, J., dissenting) (citation omitted).

242 *Id.* at 699 (majority opinion).

243 United States v. Comstock, 130 S. Ct. 1949, 1959-61 (2010) (discussing various congressional hearing reports pertaining to federal civil commitment of dangerous felons for whom the states did not want to take responsibility upon their release).

244 *Id.* at 1956 (deferring judgment on the due process considerations implicated in the Adam Walsh Act and referring the issue to its prior decisions in *Hendricks* and *Addington*).

245 *Zadvydas*, 533 U.S. at 690-91 (referencing various instances in which procedural constraints are not sufficiently strong or narrowly tailored).

such as mental illness, that helps to create [a] danger" exists, the government's interest in ensuring public safety may "outweigh[] the 'individual's constitutionally protected interest in avoiding physical restraint.'"[246]

The procedures in place under 8 C.F.R. § 241.14 do not offer every single protection available to the candidate for involuntary civil commitment (i.e., an alien cannot hire his or her own expert for a mental health evaluation). However, to the extent that there are differences that favor U.S. citizens under the Adam Walsh Act, those differences should be understood as permissible. The individuals undergoing § 241.14(f) proceedings, as noted by Justice Scalia, have no legal right to be in the United States.[247] Given the majority's concession that due process rights of aliens in the United States may not always be coterminous with those of U.S. citizens, it is hard to imagine why the provisions under the specially dangerous proceedings should be held unconstitutional.

B. *8 C.F.R. § 241.14(f) Is a Good Public Policy Decision*

The Adam Walsh Act requires that once an examining physician indicates to the Federal Bureau of Prisons that an individual is sexually dangerous, before that physician may commit the individual to a federal facility the attorney general must attempt to have the state take custody of the individual.[248] In addition, if at any time after an individual deemed sexually dangerous under the Adam Walsh Act has been committed to a federal facility a state wishes to claim responsibility for committing that individual, the attorney general must give the individual over to that state's custody.[249]

Not only would this approach not be as feasible in the case of detained aliens under 8 C.F.R. § 241.14(f), but it would also be undesirable. States have an arguably greater stake in sexually violent/specially dangerous individuals who are civilly committed under the Adam Walsh Act than individuals with no legal right to remain in the United States. Just as the *Comstock* Court noted that states often do not want to take responsibility for civilly committing federal felons upon release from prison,[250] even if a state *wanted* to bear the burden of detaining a "specially dangerous" alien, this should be discouraged.[251]

States should not be forced to bear the financial burden of civilly committing individuals whom the government has ordered removed and who

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246 *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).

247 *See id.* at 703 (Scalia, J., dissenting).

248 18 U.S.C. §§ 4247(i), 4248(g) (2006).

249 *Id.* § 4247(i).

250 United States v. Comstock, 130 S. Ct. 1949, 1959 (2010) (discussing various congressional hearing reports regarding the federal civil commitment of dangerous felons for whom states did not want to take responsibility upon release).

251 *See Zadvydas*, 533 U.S. at 703 (Scalia, J., dissenting).

have "no legal right" to be in the United States.[252] To the extent that civil commitment or continued detention of specially dangerous individuals is a national policy, its cost should be borne by the nation, not a handful of states.[253] As indicated by the DHS *2011 Yearbook of Immigration Statistics*, the distribution of aliens across America is far from even.[254] High populations of immigrant aliens are largely concentrated in a handful of states such as California and Arizona, while other states like Maine, Montana, and North Dakota house very few immigrants.[255] This idea is further supported by the allocation of immigration cases across the various U.S. courts of appeals. In a year-long period spanning 2010-2011, the Fifth and Ninth Circuits adjudicated the most immigration-related cases (843 and 457, respectively),[256] the circuit with the next highest caseload being the 11th Circuit (at 174 cases).[257] The Ninth Circuit's website even provides attorneys with two additional resources and guidelines on how to proceed with an immigration-related appeal specifically.[258] Other circuits decided as few as one or twelve such cases.[259] This disproportionate allocation of aliens would disadvantage some states if the specially dangerous provision were to be invalidated and the government was unable to retain custody over them.[260]

Federally detaining criminal aliens with final orders of removal whom the government determines are specially dangerous due to certain criminal convictions in conjunction with some mental illnesses is more appropriate than asking states to civilly commit such individuals for a potentially indefinite period. If states are required to civilly commit these individuals, the immense cost associated with detention would likely fall disproportionally to a

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252 *See id.*

253 Regarding the Adam Walsh Act, twenty-nine states submitted amici briefs to the Supreme Court in *Comstock* expressing their preference for the federal government assuming responsibility for the cost of detaining sexually dangerous predators subject to the Act. Melcher, *supra* note 188, at 649.

254 *See* OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 16 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

255 *Id.*

256 ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2011, at 33 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseload Statistics/2011/tables/B07Mar11.pdf. The Fifth Circuit has jurisdiction over appeals from the district courts in Texas, Louisiana, and Mississippi; the Ninth Circuit has jurisdiction over appeals from the district courts in Arizona, California, Montana, Nevada, Oregon, Washington, Idaho, Hawaii, and Alaska.

257 *Id.*

258 *See* Debbie Smith, *How to File a Petition for Review*, LEGAL ACTION CENTER: AM. IMMIGR. COUNCIL (Feb. 28, 2011), http://cdn.ca9.uscourts.gov/datastore/uploads/guides/petition/lac_pa_04 1706.pdf; *Ninth Circuit Immigration Outline*, U.S. CTS. FOR THE NINTH CIRCUIT, *available at* http://www.ca9.uscourts.gov/guides/immigration_outline.php (last visited Sept. 15, 2013).

259 ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 256, at 33.

260 It is worth noting that two of the three cases addressing this issue which are discussed in this Comment were argued in either the Fifth or the Ninth Circuit (*Tran* and *Tuan Thai*, respectively).

handful of states while others might bear little to no cost.[261] The costs to a state undertaking this burden would be two-fold, including not just the actual cost of detention but also the cost of treatment.

Unlike state civil commitment programs, the specially dangerous regulations propounded under 8 U.S.C. § 1231(a)(6) post-*Zadvydas* do not require treatment for detainees, but nor do they preclude treatment.[262] This allows agency discretion to administer treatment on a case-by-case basis, where it is appropriate, when individuals are amenable and progress is possible. As the Supreme Court and some of the lower courts repeatedly stated, there are times when there is no cure for a mental illness, and there are times when an individual does not comply with recommended course of treatment or therapy, which renders efforts to provide that treatment both moot[263] and a misallocation of resources.[264] The federal detention approach helps avoid sunk costs of ineffective or useless treatment for individuals who do not want to be treated or are unwilling to comply with treatment by not requiring it; however, the approach does so while still protecting a community's safety by barring that individual's release, which Congress identifies as a priority in its 1996 amendments to the INA.[265] Again, without any remaining legal right to be in the United States, it is not clear why individuals who are situated as such should benefit from citizen tax dollars to support futile treatment attempts.

CONCLUSION

In *Zadvydas v. Davis*, the Supreme Court addressed very serious constitutional concerns with the application of 18 U.S.C. § 1231(a)(6).[266] It noted that the statute was read too broadly and acted as a catchall that could lead to

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261 *See* Hannah Rappleye, *America's Expensive Sex Offenders*, SALON (Apr. 17, 2012, 11:04 AM), http://www.salon.com/2012/04/17/americas_expensive_sex_offenders/ (discussing the extreme cost states incur by administering civil commitment programs for sex offenders).

262 *See* 8 C.F.R. § 241.14(f)-(k) (2012).

263 *See* Kansas v. Hendricks, 521 U.S. 346, 366 (1997) ("[I]t would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment exist[s]."); Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1255 (10th Cir. 2008) ("Mr. Hernandez-Arenado had refused to take part in group therapy and continued to reject treatment because of his 'deep seated belief that his [pedophilic] actions are not inappropriate.'" (alteration in original)); Tuan Thai v. Ashcroft, 366 F.3d 790, 799 n.6 (9th Cir. 2004) ("After oral argument, the Government transferred Thai, *over his objections*, to Columbia, South Carolina for mental health treatment." (emphasis added)).

264 *See* Rappleye, *supra* note 261.

265 *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241(a)(6), 66 Stat. 163, 204-05 (1952) (amended in 1996 by IIRIRA and codified at 8 U.S.C. § 1231(a)(6) (2006)) (failing to mention any kind of treatment for the detained individuals).

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

indefinite detention for aliens guilty of even the most insignificant offenses.[267] It was based on these concerns that the Court called for a six-month limit for individuals whom the INS orders removed but whose actual removal is not significantly likely in the reasonably foreseeable future. However, the Supreme Court also pointed to times when continued detention may be appropriate.[268]

The attorney general's amended regulations provide for the detention of an exceptionally narrow class of individuals specifically mentioned by the majority in *Zadvydas*.[269] Anyone not subject to continued detention under those narrow circumstances is to be released in accordance with *Zadvydas*.[270] In developing this new regulatory scheme, the attorney general cured the defects that delegitimized the prior interpretation of §1231(a)(6) and maintained the constitutionality of the statute, even considering *Zadvydas*'s presumptive six-month limit on detentions. The regulations echo similar constitutionally sound procedures that are in place for the civil commitment of U.S. citizens and demonstrate sufficiency of due process. The regulations also constitute preferable public policy, and any courts facing this issue in the future should follow the Tenth Circuit's interpretation of 8 C.F.R. § 241.14(f) specially dangerous proceedings.

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267 *Id.* at 691.

268 *Id.* at 690 (stating that civil detention may be justified in "certain special and 'narrow' nonpunitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint'" (citation omitted) (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).

269 *See* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1253 (10th Cir. 2008).

270 *See id.*