

# Liberty and Security: The Yin and Yang\* of Immigration Law

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First they came for the Jews  
and I did not speak out

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\* A symbol of Chinese Taoism utilized to depict the union of opposites. MILTON M. CHIU, THE TAO OF CHINESE RELIGION 146–49 (1984).

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because I was not a Jew.

Then they came for the Communists  
and I did not speak out  
because I was not a Communist.

Then they came for the trade unionists  
and I did not speak out  
because I was not a trade unionist.

Then they came for me  
and there was no one left to speak out for me.<sup>1</sup>

## I. INTRODUCTION

Pastor Niemoller's short poem speaks of our basic fear of "speaking out" for others, especially people who are different from us. The poem was written in a European environment but could be even more apropos in the United States because of our diverse culture and our proximity to diverse individuals. Even the title of this article suggests how diversity has enriched our American culture. We owe that Chinese part of us for the metaphor of the union of opposites depicted symbolically by the image of Yin and Yang. This symbol helps explain the miracle of America, for we are, truly, a union of opposites; and it also depicts the split personality of our immigration law that swings between the two concepts of liberty and security. When it swings too far, it is the duty of each of us to "speak out," as Niemoller suggests, for those who are different from us, if for no other reason than to insure there will be someone left to "speak out" for us.

### A. *A Nation of Immigrants*

America is like a Jackson Pollock<sup>2</sup> painting, and generation after generation has dripped and slung its paint on the canvas.

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1. Pastor Martin Niemoller, *First They Came for the Jews* (1938), available at <http://www.rkdn.org/u-r-next.htm>.

2. An American abstract painter who developed the "drip" method of painting. STEPHEN NAIFEH & GREGORY WHITE SMITH, JACKSON POLLOCK, AN AMERICAN SAGA 533-42 (1989).

When closely viewed, it may seem like a haphazard collection of colors, shapes, and textures, but from a distance it is truly a masterpiece, because the old cliché is true: we are “a nation of immigrants.” Everyone in America today is an immigrant or is descended from an immigrant, whether that immigration was voluntary or not. Some would say everyone except for Native Americans, but even that is not true in the strictest sense. There was a time when Native Americans were not here. They all descended from Siberian immigrants who came to North America eighteen thousand years ago over the temporary land bridge created when the last ice age lowered the sea level in the Bering Strait.<sup>3</sup>

So just what is an American? What is it, exactly, that binds us together? Whatever it is, it most certainly is not national origin. What truly binds us together as a nation is the covenant we have made with each other to exercise freedom, reason, and tolerance toward one another as set out in the Declaration of Independence and the Constitution, *in spite of our differences*. We are not drawn together by race, religion, national origin, or sex. These do not unite us. On the contrary, we are drawn together by the ideas of freedom, reason, and tolerance set out in our laws. That is what makes us truly unique among nations. It is of the utmost importance for the preservation of our nationhood, therefore, that we be faithful to our covenant.

### *B. The “Yin” and “Yang” Points of View*

There seem to be two types of citizens in the United States. For the purpose of this article, we shall call them the “Yin” people and the “Yang” people. The “Yin” people in America are the optimists. They view immigration as a good thing for America. They operate out of a perspective of plenty. They contend that there is more than enough to go around. They say, “We have our share of the American Dream. Come on in, and we will help you get yours.”

The “Yang” people in America are the pessimists. They view immigration as a bad thing for America. They operate out of a perspective of scarcity and fear. They contend that there is not

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3. BRIAN M. FAGAN, ANCIENT NORTH AMERICA: THE ARCHAEOLOGY OF A CONTINENT 71 (Thames and Hudon eds., 2d ed. 1994).

enough to go around. They say, “We have our share of the American Dream, and, by golly, we are not going to let you take it away from us.”

“Yin” people promote inclusiveness. They talk about personal liberties, the Bill of Rights, and due process. “Yang” people, on the other hand, are fearful. They talk about national security, sovereignty, and protecting our borders.

Some may identify with “Yins,” others with “Yangs.” Some may be a little of both, and even others may be “Yins” in one set of circumstances and “Yangs” in others. Quite frankly, a self-designated “Yin” person writes this article and promotes the optimistic point of view simply because it is more faithful to our civic covenant to deal with others in a fashion that promotes freedom, reason, and tolerance. Put succinctly, there is a problem in developing immigration policies on the basis of fear. History has shown that we, Americans, get into trouble when we legislate out of fear.

### *C. The Problem with Fear*

Franklin Delano Roosevelt told our nation in 1933, “All we have to fear is fear itself.”<sup>4</sup> More specifically, he said:

So first of all let me assert my firm belief that the only thing we have to fear . . . is fear itself . . . nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance.<sup>5</sup>

Of course, our thirty-second President was right, even if, as we shall see, he did not always follow his own advice. After all, it was his order that allowed our armed forces, out of fear, to intern Japanese-Americans during World War II.<sup>6</sup>

The problem with fear is that it creates a “them and us” mindset. Both nations and individuals have a tendency to unconsciously transfer or project their own faults onto people who

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4. Franklin Delano Roosevelt, First Inaugural Address (March 4, 1933), available at <http://tanaya.net/Books/fdr10/>.

5. *Id.*

6. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (“Authorizing the Secretary of War to Prescribe Military Areas”).

are outside their group. Carl Jung has written extensively of the shadow side of our psyche, which is hidden in our unconscious and which we rid ourselves of by casting it onto others to such an extent that we demonize and dehumanize other people.<sup>7</sup> The only way we can prevent the demonization of others is to recognize the shadow side of our own personalities, thereby bringing it out of the realm of the unconscious into the realm of the conscious.<sup>8</sup> Once in the conscious realm, we can begin to control our human nature of projecting our shadow side onto others.<sup>9</sup>

This process has occurred down through human history. The children of Israel projected their faults onto the Canaanites,<sup>10</sup> the early Christians did the same to their Jewish brothers and sisters,<sup>11</sup> and later Christians did the same to other Christians in the form of heresy accusations.<sup>12</sup> This is not, however, a phenomenon that is relegated to ancient history. The twentieth century was rampant with it. The Nazi persecution of the Jews was an example on a national scale, and the United States, which has not been immune to imposing these inflictions, is another. One need only look to the witch hunts in Salem, Massachusetts, the forced relocation of Native Americans, the persecution of African-Americans, the internment of Japanese-Americans, and the Red Scare, to name just a few, to realize that when frozen with fear, we too, both as a nation and as individuals, are genetically predisposed to dehumanize and demonize people who are different from us.

This genetic predisposition to fear others has placed us in good stead at times. It has galvanized us in times of crisis and has helped us survive as a species and as a nation. A problem arises, however, when we carry it to the extreme and react fearfully rather than with reason and courage.

This is all very well and good you might say, but what in the world does it have to do with immigration laws? The answer is that we have often reacted out of fear by drafting immigration laws that project everything that is wrong with us onto immigrants. We

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7. C.J. JUNG, *THE BASIC WRITINGS OF C.J. JUNG* 78, 304–05, 314, 460, 462 (Violet Staub De Lazlo ed., Random House, Inc. 1959) (1938).

8. *Id.*

9. *Id.* at 304.

10. ELAINE PAGELS, *THE ORIGIN OF SATAN* 38 (1995).

11. *Id.* at 110.

12. *Id.* at 148.

have attempted at times to cleanse ourselves by cleansing the country of immigrants.

It is important to be aware of our history and to talk about our national “shadow side;” not to wallow in our guilt but to shed ourselves of it. We should lay it on the table for all to see; to analyze it in the light of day. If we continue to keep it locked in our civic unconscious, it will control us; but, if we bring it to the level of consciousness, we can begin to control it. If we are going to “get tough” on immigration, let us at least do so with a conscious appreciation of our tendency to project our faults onto others. Only then can we control this tendency and base our immigration laws on reason rather than fear. Certainly, left in the shadows, our fear will control both our immigration policy and ourselves. Let us hope that in the wake of the events of September 11, 2001, we will not suffer from Roosevelt’s “nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance.”<sup>13</sup>

## II. A BRIEF HISTORY OF FEAR OF IMMIGRATION IN AMERICAN LAW

### A. *The Alien and Sedition Act*

The very first attempt to restrict immigration to the United States was the Alien Act of 1798,<sup>14</sup> which was part of the Alien and Sedition Laws. It authorized the President to expel from the United States any alien deemed dangerous, but it was an unpopular law and only stayed on the books for two years.<sup>15</sup>

It is amazing how our ancestors, having just penned their names to the Constitution less than fifteen years before, could have passed such an onerous piece of legislation. It made it a crime to criticize the government, including Congress and the President. Clearly unconstitutional by today’s standards, it is generally categorized as a political attempt by the Federalists to harass Jeffersonian Republicans.<sup>16</sup> In those days, politics was a rough and

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13. Roosevelt, *supra* note 4.

14. Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570 (repealed 1897).

15. *Id.*; see also RICHARD STEEL, STEEL ON IMMIGRATION LAW 2d § 1.01 (1993).

16. IRA J. KURSBAN, KURSBAN’S IMMIGRATION LAW SOURCEBOOK 1 (7th

tumble affair compared to the genteel variety of politics practiced today. One's enemies were demonized, and no one was immune from the practice. The President at the time, John Adams, had no need to worry about the fledgling judiciary and could lash out against perceived enemies with impunity. It was only when the Jeffersonians came into power that the Acts were struck down.<sup>17</sup>

### *B. The Chinese Exclusion Act*

In the nineteenth century, thousands upon thousands of Chinese laborers were brought into the country after the Civil War to work on the Transcontinental Railroad.<sup>18</sup> As much as the Civil War had torn apart the North and the South, the Transcontinental Railroad brought together the East and the West.<sup>19</sup> With it came the telegraph line and the uninterrupted bi-coastal flow of freight. A trip that had taken six months by wagon now took one week by train.<sup>20</sup> The completion of the Transcontinental Railroad was one of the single most defining moments in the building of the nation, and it was constructed with the blood and sweat of cheap Chinese labor.<sup>21</sup> Our country should have raised monuments to their achievements. We should have rewarded them with instant citizenship for their efforts, but instead Congress passed the Chinese Exclusion Act.<sup>22</sup> You need look no further than the title to determine the purpose of this legislation, which made it a crime punishable by one year of hard labor for a Chinese person to be found within the boundaries of the United States after departing and attempting to return.<sup>23</sup> Apparently, after exploiting their labor, Congress had no more use for the Chinese.

Wong Wing challenged the constitutionality of the Act in a case that reached the United States Supreme Court in 1896.<sup>24</sup> On

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ed. 2000).

17. See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 65 (2d ed. 1992).

18. See *Transcontinental Railroad*, at <http://www.pbs.org/wgbh/amex/tcrr/>.

19. *Id.*

20. *Id.*

21. *Id.*

22. Act of May 5, 1892, ch. 60, § 2, 27 Stat. 25 (repealed 1943).

23. *Id.* § 7.

24. *Wong Wing v. United States*, 163 U.S. 228 (1896).

July 5, 1892, Wing and three other Chinese nationals were tried before a commissioner of the circuit court in the Eastern District of Michigan, found guilty, and sentenced to sixty days of hard labor.<sup>25</sup> A writ of habeas corpus was filed in federal court and discharged as having no merit, and an appeal was taken to the Supreme Court of the United States.<sup>26</sup>

The Court held that Congress had the power to admit or exclude immigrants under the Constitution as it saw fit,<sup>27</sup> and the courts could place no limit upon Congress's power "to protect, by summary methods, the country from the advent of aliens whose *race* or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein."<sup>28</sup> While such a race-driven law would hardly pass constitutional inquiry today, the *Wong Wing* Court was one of many to recognize Congress's constitutionally endowed plenary power to regulate immigration into the United States, and that the judiciary could not interfere with this power. The Court concluded that detention by the government would be valid to the extent it was needed for the exclusion or expulsion of aliens;<sup>29</sup> however, the Court did grant *Wong Wing* relief.<sup>30</sup> It held that his detention for conviction by a commissioner to one year at hard labor was unconstitutional because violation of the statute was an infamous crime for which even aliens could not be held to answer, except upon presentment or indictment of a grand jury. Nor, the Court concluded, could aliens be deprived of their liberty without due process of law.<sup>31</sup> The Court further held that Wing's right to a speedy, public trial by a jury was denied by the legislation,<sup>32</sup> inasmuch as Wing was a person within the contemplation of the Constitution.<sup>33</sup> The court held:

The term "person," used in the Fifth Amendment, is broad enough to include any and every human being

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25. *Id.* at 229.

26. *Id.*

27. *Id.* at 235.

28. *Id.* at 237 (emphasis added).

29. *Id.* at 235.

30. *Id.* at 242.

31. *Id.*

32. *Id.*

33. *Id.*

within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.<sup>34</sup>

This was good news and bad news for Wing. He had no rights regarding his deportation, but he did have rights in the criminal context. He was going back to China, but at least he could not be convicted of an infamous crime without an indictment, trial by jury, due process, and equal protection. Apparently, even deportable aliens had some constitutional rights. This would not be the last time these questions of constitutional protection and the limits of congressional and executive power to regulate immigration would be visited by the Supreme Court.

### C. Japanese Internment

December 18, 1944, was not a proud moment in the history of the Supreme Court of the United States. That was the day it rendered its decision in *Korematsu v. United States*,<sup>35</sup> which convicted Toyosburo Korematsu of disobeying a military order to evacuate the west coast and to report to an “assembly area” where Japanese-Americans like him were interned.<sup>36</sup> The decision has since fallen into disrepute, and the government of the United States has acknowledged its role in denying the liberty of Japanese-Americans during World War II by awarding affected persons reparations.<sup>37</sup> It would be highly unlikely that the Supreme Court would ever cite it as authority for anything other than its own failing in protecting the constitutional rights of Americans. One would hope that *Korematsu* is dead law. As a matter of fact, some commentators have considered the recent case of *Zadvydas v. Davis*<sup>38</sup> as an implied reversal of *Korematsu*;<sup>39</sup> but history shows

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34. *Id.*

35. 323 U.S. 214 (1944).

36. *Id.* at 218.

37. See 50 U.S.C. app. § 1989 (1)–(4) (2003).

38. 533 U.S. 678 (2001).

39. Micah Herzig, Note, *Is Korematsu Good Law in the Face of Terrorism? Procedural Due Process in the Security versus Liberty Debate*, 16

that, in times of crisis, fear will find a way to sacrifice due process upon the altar of national security. *Korematsu* may not be directly cited, but its rationale of fear may find its way into future Supreme Court opinions during times of perceived calamity.

Since *Korematsu* has lost its precedential power, a study of the dissent might shed light on what the majority's opinion should have been. The majority gave great deference to Congress and the military leaders in place, but Justice Frank Murphy, in his dissent, concluded that there are limits to the discretion exercised by our military leaders, even in times of war when martial law has not been declared.<sup>40</sup> It is the judiciary, he contended, that has the power to determine those limits when the exercise of discretion by the military conflicts with the constitutional rights of individuals.<sup>41</sup> He proposed a test to determine when the military, out of necessity, may impinge upon the constitutional rights of individuals.<sup>42</sup>

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.<sup>43</sup>

Justice Murphy readily admitted that there were, indeed, justifiable fears of immediate invasion of the Pacific Coast and of sabotage and espionage in the spring of 1942, but he concluded that the action of the military commander, Lieutenant General J. L. De Witt, did not meet his proposed test because the exclusion of all persons of Japanese ancestry, both alien and non-alien, bears no reasonable relationship to the danger of invasion and sabotage.<sup>44</sup> For that relationship to exist, Justice Murphy argued, one must

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GEO. IMMIGR. L.J. 685, 687 (2002).

40. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

41. *Id.* at 234 (Murphy, J., dissenting).

42. *Id.* (Murphy, J., dissenting).

43. *Id.* (citations omitted) (Murphy, J., dissenting).

44. *Id.* at 235 (Murphy, J., dissenting).

assume “that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshaled in support of such an assumption.”<sup>45</sup> After analyzing the justifications put forth by the military, he concluded:

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.<sup>46</sup>

Justice Murphy quoted the managing secretary of the Salinas Vegetable Grower-Shipper Association to support his conclusion, who candidly stated:

“We’re charged with wanting to get rid of the Japs for selfish reasons. We do. It’s a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work and they stayed to take over . . . . They undersell the white man in the markets . . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we’d never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don’t want them back when the war ends, either.”<sup>47</sup>

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45. *Id.* (Murphy, J., dissenting).

46. *Id.* at 239 (Murphy, J., dissenting).

47. *Id.* at n.12 (citations omitted) (Murphy, J., dissenting).

It is clear that the secretary of the association was motivated by fear. Jung might say that this fear became guilt, derived from failure, hidden in his shadow side, and projected onto people who are different from him,<sup>48</sup> the same “other people” who frightened the children of Israel and the early Christians.<sup>49</sup> Justice Murphy’s opinion underscored that fears such as these do not justify a mass violation of the constitutionally protected rights of due process, equal protection, the right to live, work, and establish a home where one chooses, and to move freely about the country.<sup>50</sup>

Justice Murphy discounted the Government’s argument that there was not time to act, asserting that not all the Japanese-Americans were evacuated until nearly a year after Pearl Harbor.<sup>51</sup> He stated this time could have been better used conducting individual hearings to determine who was loyal and who was not just as Britain and our own country did in the cases of Germans and Italians.<sup>52</sup>

Justice Robert Jackson also dissented in *Korematsu*, but while Justice Murphy emphasized the constitutional limits of the exercise of military discretion in time of war, Justice Jackson emphasized the inability of the judiciary to enforce essentially military orders, especially unconstitutional ones.<sup>53</sup> Justice Jackson concluded that military decisions by their very nature are not readily susceptible to judicial review, and, in doing so, bowed to the war power given to Congress and the executive branch by the Constitution.<sup>54</sup> He stated that the law, based upon the orders of the military, was unconstitutional.<sup>55</sup> He argued:

[G]uilt is personal and not inheritable. Even if all of one’s antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that “no Attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.” But

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48. See *supra* text accompanying note 7.

49. See *supra* text accompanying note 10.

50. *Korematsu*, 323 U.S. at 234–35 (Murphy, J., dissenting).

51. *Id.* at 241–42 (Murphy, J., dissenting).

52. See *id.* at 241 (Murphy, J., dissenting).

53. *Id.* at 244–48 (Jackson, J., dissenting).

54. *Id.* at 244–45 (Jackson, J., dissenting).

55. *Id.* at 243 (Jackson, J., dissenting).

here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.<sup>56</sup>

Civil courts, said Jackson, cannot be forced to uphold an unconstitutional military order even if it is a reasonable exercise of military authority.<sup>57</sup> It is up to the military to determine whether its orders are reasonable, and the civil courts should restrain from assuming jurisdiction.<sup>58</sup> Justice Jackson articulated that the Court should order the prisoner's release, not because the action of the military was arbitrary or unreasonable, but because the courts should not delve into the reasonableness of military orders.<sup>59</sup>

Consequently, Murphy and Jackson reached the same conclusion for reasons poles apart. Murphy said the courts should interfere to protect individual rights, even in times of war when there is no declaration of martial law, if there is no reasonable connection between the action and the stated military purpose.<sup>60</sup> Jackson said there should be no interference because the courts should not be asked to enforce a clearly unconstitutional order, as it is solely within the province of the military to assess the validity of its orders.<sup>61</sup> If nothing else, these dissenting opinions display the split personality of the Supreme Court concerning due process and individual rights on one side and, on the other, the "hands off" attitude in reviewing the reasonableness of Congress and the executive in executing their plenary war powers in times of emergency.

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56. *Id.* at 243–44 (Jackson, J., dissenting).

57. *Id.* at 247 (Jackson, J., dissenting).

58. *See id.* at 247–48 (Jackson, J., dissenting). Please note that *Korematsu* evolved from the violation of a statute criminalizing the refusal to obey a military order. *See supra* text accompanying note 36.

59. *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

60. *Id.* at 233–42 (Murphy, J., dissenting).

61. *Id.* at 242–48 (Jackson, J., dissenting).

#### D. The Red Scare

In 1967, our country was at war again, but this time America was fighting the communist government of North Vietnam. From World War II, through Korea, Vietnam and the Cold War, the major fear in the United States was communism. McCarthyism and the opposition to the war in Vietnam had pitted Americans against one another.<sup>62</sup> Each side of the issue accused the other of losing track of “American Values.”<sup>63</sup> It was a classic case of fear causing a projection of guilt and shame on “the other people.” So-called liberals and conservatives began dehumanizing and demonizing one another in the media.<sup>64</sup> A popular play even used the Salem witch-hunts as a metaphor to describe the phenomenon.<sup>65</sup> It is against this backdrop that the Supreme Court decided the case of *United States v. Robel*.<sup>66</sup>

Eugene Frank Robel was indicted in 1963 for violating the Subversive Activities Control Act of 1950,<sup>67</sup> which declared it unlawful for any member of a Communist-action organization to be employed in any defense facility as designated by the Secretary of Defense.<sup>68</sup> Mr. Robel had been a member of the Communist Party and was, at the time of the indictment, employed as a machinist at Todd Shipyards in Seattle, Washington, which the Secretary of Defense had designated a “defense facility” in 1962.<sup>69</sup>

In *Robel*, the Supreme Court came down on the side of individual rights, holding that the statute in question violated Robel’s “right of association protected by the First Amendment.”<sup>70</sup> While the Court acknowledged Congress’s war power and gave “broad deference” in the exercise of its constitutional war power, the Court held that “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional

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62. See generally ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS (1994).

63. *Id.*

64. *Id.*

65. See ARTHUR MILLER, THE CRUCIBLE (Penguin Books 1976) (1953).

66. 389 U.S. 258 (1967).

67. Subversive Activities Control Act of 1950, 50 U.S.C. § 784(a)(1)(D) (repealed 1993).

68. *Robel*, 389 U.S. at 260.

69. *Id.*

70. *Id.* at 261.

power which can be brought within its ambit.”<sup>71</sup> In other words, there are constitutional limits that Congress may not cross in the exercise of the power given to it by the Constitution, and the arbiter of those limits is the Court.

Concerning Congress’s war power, the Court stated as follows:

[T]his concept of “national defense” cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.<sup>72</sup>

Despite Congress’s legitimate governmental interest in protecting the nation’s defense production facilities, the Court concluded that the statute in controversy was unconstitutional because it attempted to reach constitutional goals by unconstitutional means.<sup>73</sup> The Court held that if the government’s exercise of its legitimate power abridges a substantial constitutional right, the government must draw the legislation narrowly in a manner that avoids the conflict.<sup>74</sup> Another option, found in Justice Brennan’s concurrence, suggested that Congress should build into the legislation procedural safeguards that preserve due process affecting fundamental rights, especially in a criminal context such as the one before the Court.<sup>75</sup> The Subversive Activities Control Act of 1950 was unconstitutional

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71. *Id.* at 263.

72. *Id.* at 264.

73. *Id.* at 266–68.

74. *Id.* at 267–68.

75. *Id.* at 272–75 (Brennan, J., concurring).

because it was broad in its application and contained no procedural safeguards for the preservation of personal liberties.<sup>76</sup>

*Robel*, therefore, was a case that overcame the national climate of fear. With McCarthyism discredited, the Court refused to allow national defense to override personal liberties. There are limits to Congress's war powers. The government must exercise its power in a reasonable way to preserve personal liberties. One hopes, in the war against terrorism, that the principles set forth in *Robel* become accepted law.

### III. RECENT DECISIONS AND DEVELOPMENTS

#### A. *The Holding in Zadvydas v. Davis*

On its face, *Zadvydas v. Davis*<sup>77</sup> stands for the premise that an alien ordered removed may not be detained indefinitely.<sup>78</sup> Ketutis Zadvydas was a permanent resident who was ordered removed on the basis of his criminal convictions.<sup>79</sup> When the government attempted to remove him, it discovered that he was not accepted either by Germany, his country of birth, or Lithuania, the country of his parents' birth, on the grounds that he was a citizen of neither.<sup>80</sup> After the removal period expired, the INS continued to detain Zadvydas on the grounds that he was a danger to the community and a flight risk.<sup>81</sup>

The Supreme Court ruled that an alien ordered removed may not be detained indefinitely if there is little probability of his removal.<sup>82</sup> This holding seems to be a great victory for those on the side of protecting an alien's liberty; but is it? A closer reading shows that *Zadvydas* may be more of a defeat than a victory.

To begin with, the case is not based upon constitutional interpretation but, instead, on statutory construction. The Court observed that any statute allowing indefinite detention "raises a

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76. *Id.* at 261 (Brennan, J., concurring).

77. 533 U.S. 678 (2001).

78. *Id.* at 682.

79. *Id.* at 684.

80. *Id.*

81. *Id.*

82. *Id.* at 699.

‘serious doubt’ as to its constitutionality.”<sup>83</sup> Following the rubric that constitutional questions should be avoided if at all possible, the Court attempted to give the statute a reasonable interpretation to avoid the constitutional conflict.<sup>84</sup> It is better to construe the statute in such a manner as to avoid invalidity so that Congress’s express will in the passage of the law will not be eliminated. The Court indicated that it was unaware of any congressional intent to allow for indefinite detention and, therefore, inferred that the time of detention should be limited to a “period reasonably necessary” to remove the alien from the United States.<sup>85</sup> While avoiding a constitutional conflict, the Court did not give much constitutional guidance concerning the indefinite detention other than saying, “The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such [procedural] protection is obvious.”<sup>86</sup>

The *Zadvydas* Court faulted the statute for its lack of procedural protections in the face of the potential loss of a fundamental right of liberty.<sup>87</sup> It pointed out that the only procedural protection in the statute forces the alien to prove that he is not dangerous in an administrative proceeding, with no opportunity for judicial review.<sup>88</sup> The Court suggested that the Constitution “may well” prevent an administrative body from making unreviewable decisions affecting fundamental rights.<sup>89</sup>

In essence, the procedural plan advanced by the Court allows the detention beyond the ninety-day removal period a provided in the statute for a limited time, i.e., six months.<sup>90</sup> At that point, the alien must show that there is no significant likelihood of removal in the reasonably foreseeable future, which the government can then rebut.<sup>91</sup> As such, the likelihood of removal is something uniquely within the knowledge of the government, not the alien.

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83. *Id.* at 689.

84. *Id.* (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

85. *Id.*

86. *Id.* at 692.

87. *Id.*

88. *Id.*

89. *Id.* at 692.

90. *Id.* at 701. The government can also submit sufficient evidence to rebut the alien’s proof. *Id.*

91. *Id.*

This procedure, offered by the statute and approved by the *Zadvydas* Court, is constitutionally suspect. It is fundamentally unfair and, therefore, a denial of due process to require the alien to prove a negative. Should not the government have the burden of showing the likelihood of removal rather than the alien of proving the unlikelihood of removal? Because it gives the alien the burden of proving a negative, this procedure is no safeguard at all.

The *Zadvydas* Court also carved out an exemption for terrorism and other “special circumstances” that permits indefinite detention.<sup>92</sup> Such an exemption is, of course, prudent, and in the post-9/11 world, even prescient for the pre-9/11 *Zadvydas* Court. But the government has carried this loophole to the extreme by writing legislation that makes every person a potential terrorist. Under the USA PATRIOT Act, the first post-9/11 enactment concerning terrorism, Congress expanded the definition of “Terrorist Activity.”<sup>93</sup> It now includes the use of any weapon or dangerous device “with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.”<sup>94</sup> The only limitation is that the use of the weapon must not be for “mere personal monetary gain.”<sup>95</sup> Such a definition is narrow enough to exclude a bank robber who seeks monetary gain, but broad enough to include a woman chasing her husband with a rolling pin.<sup>96</sup> This example is, of course, ludicrous; the point being, however, that an overzealous official bent on ridding the country of “undesirables” could justify the indefinite detention of many alleged terrorists based on the new, broad definition, notwithstanding the ruling in *Zadvydas*.

Less than a month after the decision, the Attorney General responded to the *Zadvydas* ruling in the form of a memorandum directing the Commissioner of the Immigration and Naturalization Service (INS) to draft regulations enumerating “special circumstances” described in *Zadvydas* that justify indefinite

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92. *Id.* at 696.

93. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 411(a)(1)(F), 115 Stat. 272, 346-47 (codified at 8 U.S.C. § 1182) (2003).

94. *Id.*

95. *Id.*

96. *See id.*

detention.<sup>97</sup> The swiftness of his response indicates his willingness to do everything in his power to soften the effect of the ruling. The INS did issue regulations that declare four instances where detention may exceed six months even though removal is improbable.<sup>98</sup> The regulations include aliens with highly contagious diseases, aliens whose release would pose “serious adverse foreign policy consequences,” aliens who are terrorists or threaten national security, and aliens who are especially dangerous because of mental illness.<sup>99</sup> All of these special circumstances, except the last one, are non-reviewable.<sup>100</sup>

The Attorney General has shown his intention to exploit the possible *Zadvydas* loophole to the fullest extent. The problem is that he believes that he, not the Supreme Court, should have control in all matters of immigration, and this is the real crux of the matter. Do the Executive and Legislative Branches have plenary power over immigration, or may the courts intervene? Attorney General Ashcroft says the courts should not intervene, but *Zadvydas* states that while Congress and the Executive have plenary power, their power is limited.<sup>101</sup> It must use a constitutional means to implement constitutional power.<sup>102</sup> Apparently, *Robel* is still alive and well in the Supreme Court.

Another criticism of *Zadvydas* is the upholding of the entry fiction set out in such cases as *Shaughnessy v. United States ex rel. Mezei*.<sup>103</sup> Much maligned, the entry fiction is based on the notion that non-citizens at the border are still outside the United States despite the fact they are literally inside the United States, usually at an immigration post or checkpoint.<sup>104</sup> The fiction is necessary to combat the well-established principle that the protection of the Constitution is available to all persons who are inside the United States. That is to say that aliens inside the United States cannot be deprived of their liberty without due process and are entitled to the equal protection of the law whether they are here legally or

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97. Notice of Memorandum, 66 Fed. Reg. 8, 433 (July 19, 2001).

98. See 8 C.F.R. § 241.14 (2002).

99. *Id.*

100. *Id.*

101. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

102. *Id.*; see also *INS v. Chadha*, 462 U.S. 919, 944 (1983).

103. 345 U.S. 206 (1953).

104. *Id.*

illegally, temporarily or permanently.<sup>105</sup> The rule in *Shaughnessy* is that while non-citizens *inside* the United States are protected by the Constitution, non-citizens *outside* the United States have no right to due process, and the government can treat them as arbitrarily and capriciously as it wishes.<sup>106</sup> The government's argument in *Zadvydas* was that the alien's formal removal and his non-status as an immigrant placed him outside the border for constitutional purposes, and that, combined with his being dangerous, justified indefinite detention.<sup>107</sup>

The *Zadvydas* Court acknowledged the concept of the entry fiction but rejected the argument without really responding to it.<sup>108</sup> The Court's acknowledgement is a retreat from its previous ruling in *Landon v. Plasencia*,<sup>109</sup> holding that a permanent resident applying for readmission was entitled to due process. The *Zadvydas* ruling is disappointing because it misses the opportunity to do away with the entry fiction, once and for all. The entry fiction has no purpose other than to allow the government to act capriciously and to deem any process it invents as "due process" by its own pronouncement. One would hope that our government, being a creature of the Constitution, could not act in a manner inconsistent with it, whether the action takes place inside or outside the geographic borders of the country.

While *Zadvydas* may, at first blush, appear to be a victory for immigration advocates, upon closer analysis, the victory may be fleeting, especially in the aftermath of fear generated by the recent and tragic events of September 11, 2001.

#### B. *The Holding in INS v. St. Cyr*

The Supreme Court, in *INS v. St. Cyr*,<sup>110</sup> answered two questions in a fashion that was extremely helpful to permanent resident immigrants.<sup>111</sup> The first involved the availability of the writ of habeas corpus. The second concerned the repeal of section

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105. See *Plyler v. Doe*, 457 U.S. 202, 210–18 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

106. See *Shaughnessy*, 345 U.S. at 212.

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

108. See *id.*

109. 459 U.S. 21 (1982).

110. 533 U.S. 289 (2001).

111. *Id.* at 292–93, 298–326.

212(c) of the Immigration and Nationality Act of 1952 (INA) and its retroactive application for permanent residents convicted of aggravated felonies by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).<sup>112</sup>

St. Cyr was born in Haiti and admitted to the United States as a permanent resident in 1986.<sup>113</sup> In 1996, he pleaded guilty to a charge of selling a controlled substance, which made him deportable.<sup>114</sup> At the time of his conviction, relief from deportation was available to him in the form of INA section 212(c), which grants a waiver to lawful permanent residents like St. Cyr who have resided in the United States for a period of seven years.<sup>115</sup> Thus, if St. Cyr had been placed into deportation proceedings as a result of his conviction at that time, he would, theoretically, have had the safety net of section 212(c) available to him.

St. Cyr's problem arose because he was not placed into deportation proceedings until April 10, 1997, after the effective dates of both AEDPA, which made 212(c) relief unavailable to aggravated felons like St. Cyr, and IIRAIRA, which repealed the waiver altogether.<sup>116</sup> As a result, he was deported; he later petitioned for a writ of habeas corpus in federal district court.<sup>117</sup>

The INS argued before the Supreme Court that the writ of habeas corpus was not available to St. Cyr because both AEDPA and IIRAIRA had stripped all courts of habeas jurisdiction.<sup>118</sup> The Supreme Court disagreed, saying that the question raised by St. Cyr was a question of pure law.<sup>119</sup> While habeas, traditionally, is not available to review discretionary findings, it can be used to correct improperly determined legal questions.<sup>120</sup> In addition, the Court determined that the failure to exercise discretion was a

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112. *Id.* at 292.

113. *Id.* at 293.

114. *Id.*

115. *Id.* at 294–95 (citing Immigration and Nationality Act of 1952 § 212(c), 8 U.S.C. § 1182(c) (2000)).

116. *Id.* at 297.

117. *Id.* at 298.

118. *Id.*

119. *See id.* at 298–300.

120. *See id.* at 307–08.

question of law and not a question of discretion.<sup>121</sup> That is to say that the lower court's decision that St. Cyr was not eligible for discretionary relief under 212(c) was a legal issue and not a discretionary one. As a result, since St. Cyr attacked the lower court's finding concerning his eligibility for discretionary relief and not the actual exercise of that discretion, he raised a question that was reviewable by habeas corpus.<sup>122</sup>

It would behoove immigration counsel, therefore, to couch habeas petitions in the terms of mistakes of law rather than in terms of abuse of discretion. Many times a factual determination is needed to determine if an individual is entitled to a form of discretionary relief. What may be an issue of fact can blur into a question of law. It is not always clear what is purely a question of law and what is purely a question of fact or discretion.<sup>123</sup> Counsel should use these blurred areas in favor of their clients by classifying them in terms of questions of law and not in terms of the failure to exercise discretion.

Next, the INS argued that habeas relief had been barred by both AEDPA and IIRAIRA.<sup>124</sup> Again, the Supreme Court disagreed, ruling that there was a strong presumption in favor of the review of administrative action.<sup>125</sup> If Congress wants to repeal habeas jurisdiction, it must do so by clear and unambiguous language.<sup>126</sup> Here, according to the Court, there was no such repeal.<sup>127</sup>

In support of its argument, the INS pointed to a previous enactment of Congress, which preserved review by writ of habeas corpus and which was repealed by AEDPA, as an indication that Congress wished to do away with habeas review.<sup>128</sup> The Court disagreed because a statute's "repeal cannot be sufficient to eliminate what it did not originally grant--namely habeas jurisdiction pursuant to 28 U. S. C. §2241."<sup>129</sup>

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121. *Id.*

122. *Id.* at 298, 307-08.

123. Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 433-34 (2002).

124. *St. Cyr*, 533 U.S. at 298.

125. *Id.*

126. *Id.* at 299.

127. *Id.*

128. *Id.* at 309-10.

129. *Id.* at 310.

Finally, the INS argued that IIRAIRA states that no court shall be empowered to review the final orders of removal based on certain criminal grounds and other forms of judicial review.<sup>130</sup> The Court countered that the terms “judicial review” and “habeas corpus” are two distinct forms of relief and that because the statute did not specifically mention the relief of habeas, it was not a sufficiently clear and unambiguous statement to repeal habeas relief.<sup>131</sup>

The second major issue before the Court was the retroactivity of IIRAIRA. Based upon the Board of Immigration Appeals’s decision as modified by the Attorney General, *In re Soriano*,<sup>132</sup> the INS had concluded that St. Cyr was not entitled to 212(c) relief because he was not in proceedings prior to the enactment of IIRAIRA, which repealed the waiver for permanent residents.<sup>133</sup> Once again the Supreme Court did not agree.

It ruled that if Congress wants to apply a statute retroactively, it must indicate as much by clear language,<sup>134</sup> something the Court said that Congress did not do. The Court noted that the fact that the legislation was comprehensive did not warrant a finding of retroactivity.<sup>135</sup> In addition, the mere fact the statute stated that it was effective on a certain date was not conclusive. Therefore, the question became whether Congress clearly indicated its retroactive intent. The Supreme Court said there was no such intention in this case, because in other sections of IIRAIRA Congress specifically noted retroactivity.<sup>136</sup> If Congress noted retroactive intent in other statutes, the Court reasoned, the fact that Congress did not note it regarding the repeal of 212(c) relief was indicative of an intention not to apply that section retroactively.<sup>137</sup> Consequently, the repeal of 212(c) was held not retroactive and stood ready as a remedy for St. Cyr in his removal proceeding.<sup>138</sup>

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130. *Id.* at 310–11.

131. *Id.* at 311–13.

132. 21 I. & N. Dec. 516 (Att’y Gen. 1997).

133. *St. Cyr*, 533 U.S. at 315.

134. *Id.* at 316 (citing *Martin v. Hadix*, 527 U.S. 343, 361–62 (1999)).

135. *Id.* at 317 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)).

136. *Id.* at 318–19.

137. *Id.* at 320.

138. *Id.* at 326.

Like *Zadvydas*, the long-term effect of *St. Cyr* is in doubt. To begin with, the number of aliens is limited. There are just not that many aliens who fall within the window of time allowed by the decision; i.e., those who pled guilty to felonies prior to the enactment of IIRAIRA. As time marches on, practitioners are liable to see less and less of those cases.

Moreover, the decision limits itself to those cases where the alien pled guilty rather than going to trial.<sup>139</sup> This begs the question of the effect of *St. Cyr* in situations where the alien was found guilty after a trial. Of course, the argument could be made that the situation is the same. The alien took the risk of a trial based upon his belief that even if he were found guilty, he would still be eligible for 212(c) relief.

Unfortunately, the courts that have considered this question have decided that *St. Cyr* only applies to those cases where the alien pled guilty and did not go to trial.<sup>140</sup> Essentially, these cases each base their opinion on the lack of *quid pro quo* benefits to the government in not having to go to the expense of trial. How this is relevant to the issue is unclear. If IIRAIRA is not retroactive, the relief ought to be available to the alien regardless of the benefit to the government. Perhaps we will hear more from the Supreme Court on the issue of guilty verdicts after a trial as opposed to guilty pleas before trial. Counsel would be well advised, therefore, to offer the argument that a guilty verdict after a trial does not strip the client of 212(c) relief, until the Supreme Court hands down a final ruling to the contrary.

*St. Cyr* may have a tremendous impact on issues other than 212(c). If IIRAIRA is not retroactive regarding 212(c), it can be argued that it is not retroactive concerning other matters. For instance, according to IIRAIRA, aliens convicted of an aggravated felony are not entitled to 212(h) relief, which grants individuals who are removable on account of criminal convictions a waiver of their conviction for certain crimes.<sup>141</sup> The argument for no retroactive application described in *St. Cyr* to a 212(c) waiver would be equally applicable to the waiver under 212(h).

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139. *Id.*

140. *Rankine v. Reno*, 319 F.3d 93, 96 (2d Cir. 2003); *Brooks v. Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002).

141. 8 U.S.C. § 1182(h)(2) (2001).

At least one court has used this principle of non-retroactivity, ruling that the conviction of a crime prior to the passage of IIRAIRA does not invoke the “stop time” rule, leaving an alien eligible for cancellation of removal.<sup>142</sup> For an alien to be eligible for cancellation of removal, he must have seven years of physical presence.<sup>143</sup> IIRAIRA states that time accruing after the commission of a crime will not be counted for the purposes of cancellation.<sup>144</sup> The court in *Henry v. Ashcroft*,<sup>145</sup> following *St. Cyr*, stated that since the provision is not retroactive, the time accrued after convictions that occurred prior to the passage of IIRAIRA can be considered for cancellation.<sup>146</sup>

There are many such opportunities for the application of *St. Cyr* by creative counsel. The lesson to be learned is to always review *St. Cyr* before surrendering to the restrictions put in place by IIRAIRA and AEDPA.

### *C. The Availability of Bond*

Under the law, as presently drafted, aliens in removal proceedings or deportation proceedings who have committed crimes must be detained pending their removal hearings. The requirement is mandatory, and the alien is not entitled to a hearing regarding his or her risk of flight or danger to the community.<sup>147</sup> Most other aliens in removal proceedings are eligible for a bond as determined by the Bureau of Immigration and Customs Enforcement and, if desired, reconsidered by the Immigration Judge.<sup>148</sup> This law was recently challenged in the courts regarding its constitutionality.

Four of the eleven circuits had struck the law down as unconstitutional. They were the third,<sup>149</sup> fourth,<sup>150</sup> ninth,<sup>151</sup> and

142. *Henry v. Ashcroft*, 175 F. Supp. 2d 688, 693 (S.D.N.Y. 2001).

143. 8 U.S.C. § 1229b(a)(2) (2003).

144. *Id.* § 1229b(d)(1).

145. *Ashcroft*, 175 F. Supp. 2d at 688.

146. *Id.* at 696.

147. 8 U.S.C. § 1226(c) (2000).

148. *Id.* § 1226(a)(2)(A); 8 C.F.R. §§ 3.19, 236.1(d) (2002).

149. *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001).

150. *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002).

151. *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002).

tenth<sup>152</sup> circuits. Only the seventh circuit upheld it.<sup>153</sup> The ninth circuit case, *Kim v. Ziglar*,<sup>154</sup> was recently reviewed by the Supreme Court and restyled as *Demore v. Kim*.<sup>155</sup>

The court of appeals had used *Zadvydas*,<sup>156</sup> to justify its finding, holding that all persons in the United States, including aliens, are entitled to the protection of the Due Process Clause<sup>157</sup> and that the government must show “the detention is [the result of] a criminal proceeding with adequate procedural protections, or, *in certain special and narrow non-punitive circumstances*, where a *special justification*, such as harm-threatening mental illness, outweighs the individual’s constitutionally protected interest in avoiding physical restraint.”<sup>158</sup> The arguments of the INS that Kim was a flight risk were unpersuasive to the court in view of the remedies available to him in defense of his removal proceeding, such as 212(c) and withholding of removal.<sup>159</sup> It was not a forgone conclusion that he would be ordered removed.

It was illogical to the court of appeals to make bond available to aliens with final orders of removal, which is allowed by the Act, and not to those presently involved in removal proceedings.<sup>160</sup> The lower court concluded that bail for criminal aliens does not leave an “unprotected spot in [our] Nation’s armor,” as argued by the INS, noting:

We must remember that our “Nation’s armor” includes our Constitution, the central text of our civic faith. It is the foundation of everything that makes our country’s system of laws and freedoms worth defending.<sup>161</sup>

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152. Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002).

153. Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).

154. *Kim*, 276 F.3d at 523.

155. 123 S.Ct. 1708 (2003).

156. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

157. *Kim*, 276 F.3d at 530.

158. *Id.* (quoting *Zadvydas*, 533 U.S. at 690).

159. *Id.* at 531.

160. *Id.* at 535.

161. *Id.* at 538–39.

The Supreme Court disagreed, holding that Congress has a legitimate concern that deportable criminal aliens will continue to engage in crimes and will not appear for their removal hearings.<sup>162</sup>

On the bright side, for immigration advocates, the Court concluded it did have jurisdiction despite the argument that 8 U.S.C. § 1226(e) limits judicial review of discretionary decisions of the Attorney General, noting that Kim was not challenging a discretionary decision of the Attorney General, but rather the constitutionality of the statute itself.<sup>163</sup> Moreover, the court held that there is no specific provision contained in the statute specifically barring review by habeas corpus.<sup>164</sup>

To the chagrin of immigration advocates, the Court denied Kim's right to a bond hearing, totally discounting the lower court's finding that Kim was a permanent resident in the United States and, therefore, a member of a class of immigrants most favored in the law.<sup>165</sup> The Court held, mostly on the basis of statistical data, that twenty percent of criminal aliens in removal proceedings failed to report for their removal hearings,<sup>166</sup> and further that detention of criminal aliens during the process of removal without a bond hearing does not deny those aliens of their right to due process.<sup>167</sup>

The Supreme Court's rationale is flawed. First, it totally disregards the strongest aspect of Kim's case. He is a lawful permanent resident. This was the foundation of the lower court's decision and was not addressed by the Supreme Court. As the lower court pointed out, permanent residents are the most favored class of aliens in the United States.<sup>168</sup> Most of them have relatives who are either United States citizens or lawful permanent residents themselves.<sup>169</sup> Many are highly educated, possessing skills that can contribute to the economy and society of the United States.<sup>170</sup> They can apply for citizenship and have the unrestricted right to

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162. *Demore v. Kim*, 123 S.Ct. 1708, 1712 (2003).

163. *Id.* at 1714.

164. *Id.*

165. *Id.* at 1713.

166. *Id.* at 1715.

167. *Id.* at 1722.

168. *Kim v. Ziegler*, 276 F.3d 523, 528 (2002).

169. *Id.* at 528.

170. *Id.*

work in the United States.<sup>171</sup> This right to live and work in the United States is not, as the lower court has noted, a matter of grace, but a matter of law which cannot be taken away from the permanent resident until a final administrative order of removal is entered,<sup>172</sup> an event which has not yet occurred in Kim's case.<sup>173</sup> In view of these rights, a permanent resident alien, like Kim, has a clear and crucial personal expectation of remaining at liberty during a removal hearing which cannot be taken from him without due process in the form of a bond hearing concerning his danger to the community and the risk of his flight.<sup>174</sup>

Secondly, the Supreme Court substitutes statistical data for due process. The Court relies on studies that show that more than twenty percent of criminal aliens fail to appear for their removal hearing, but is not that the very purpose of a bond hearing: to determine the flight risk associated with the alien? The better practice would be to conduct a short hearing before an Immigration Judge rather than to rely on cold statistics, which may or may not apply. Such a hearing would insure for the alien the procedural safeguards required by *Robel*.<sup>175</sup>

The Supreme Court's statistics are flawed in another material respect. They are wrong. The Court admitted as much when it acknowledged that the "twenty percent" figure included those "who were released on bond *or otherwise not kept in custody*."<sup>176</sup> There is no way to determine from the studies cited by the Court what percentage were released on bond and what percentage were otherwise not kept in custody. Without this data, the statistic is meaningless and casts no light on the risk of flight of aliens in Kim's position.

Likewise, the Supreme Court totally dismisses the statistics of the Appearance Assistance Program, which showed that bond, in conjunction with supervision and reporting requirements, dramatically increased the likelihood of an alien's appearance at his removal hearing. The Court's summary conclusion that Kim was seeking a bond hearing and not supervision belies the point

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171. *Id.*

172. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p).

173. *Fouroughi v. INS*, 60 F.3d 570 (9<sup>th</sup> Cir. 1995); 8 C.F.R. § 1.1(p).

174. *Id.* at 528.

175. 389 U.S. 258 (1967).

176. *Demore v. Kim*, 123 S.Ct. 1708, 1716 (2003).

that reporting requirements and supervision are tools often used by the government in cases where removal is not practical.<sup>177</sup>

Suffice it to say, the *Kim* ruling is a setback for immigration advocates. It will further deny due process to aliens who must now defend the government's accusation of removability from behind bars.

#### *D. Special Registration*

One of the reactions of the Bush administration to September 11, 2001 has been the call for the special registration of aliens in the country who entered legally from twenty-five specified countries, all of which are Arab or Muslim, other than North Korea. The legislative basis for the registration is 8 U.S.C. § 1305(b), which gives the Attorney General the ability to call for the special registration of any group or class of alien.<sup>178</sup> As a result of this registration process, many aliens are being arrested and placed into proceedings.

The call for the registration of Muslim aliens is perilously similar to the order addressed to Japanese-Americans to report to assembly centers during World War II. Of course, in the case of Japanese-American internment, the government was dealing with United States citizens, and special registration only involves aliens temporarily residing in the country. Still, there are problems. The effect of special registration is racial profiling and the warrantless arrest of individuals who dutifully report to the INS for registration. In fact, a class action has been filed by the American-Arab Anti-Discrimination Committee, the Center for Human Rights and Constitutional Law, the Council on American-Islamic Relations, and others, in the United States District Court for the Central District of California under docket number SA CV 02-1200 AHS (ANX) challenging Special Registration on the basis of racial profiling and warrantless arrests. Judge Alicemarie H. Stotler denied the request for a temporary restraining order on January 15, 2003, but discovery is on-going, and, regardless of the outcome, an appeal to the ninth circuit is probable.<sup>179</sup>

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177. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

178. 8 U.S.C. § 1305(b) (2000).

179. Telephone Interview with Peter A. Schey, attorney for the Center for Human Rights and Constitutional Law (Feb. 1, 2003).

So far no terrorists have been detected, nor have they registered, but thousands of temporary alien residents have been targeted for investigation simply on the basis of their national origin or their religion. Special registration is administrative overkill. It is the equivalent of rounding up without probable cause all aliens from a certain region of the world who practice Islam because Muslims from or near that region committed a terrible crime. If *Zadvydas* is correct in saying that all persons in the country are entitled to the protection of the Constitution regardless of their alienage, whether illegal or legal, whether temporary or permanent, then, arguably, special registration is an illegal means to a legitimate governmental goal that violates both due process and equal protection, because it is a fear-based, arbitrary, and capricious dragnet that ensnares everyone, save the guilty.

#### IV. RECOMMENDATION

It is time the courts did away with the entry fiction. It has no purpose other than to allow the government to deal with aliens at the border without regard to the Constitution. Should not our government deal with everyone with fundamental fairness? After all, the government is a “creature of the Constitution.”<sup>180</sup> It exists because the Constitution says it exists. It has power because the Constitution says it has power. Since the Constitution is the creator of the government, it is impossible for the government to act in the absence of the Constitution anywhere in the world. Wherever the government acts, the Constitution must be there. It is the government’s shadow, and the government cannot be shed of it. As a result, the government cannot act unless it does so within the Constitutional restraints applicable to it wherever the action occurs.

When the government focuses its power on an individual, that individual becomes a part of our community and one of the governed.<sup>181</sup> Aliens are, therefore, one of the “people” or “persons” protected by the Constitution. It is simply a matter of

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180. *Reid v. Covert*, 354 U.S. 1, 5–6 (1957).

181. For an interesting discussion of this concept, see the dissenting opinion of Justices Brennan and Marshall in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 283–84 (Brennan, J., and Marshall, J., dissenting), *reh’g denied*, 494 U.S. 1092 (1990).

mutuality. If we expect aliens to abide by the laws of the United States, axiomatically, we are obliged to give them the protection of those laws.<sup>182</sup> One of the framers of the Constitution, James Madison, spoke to this issue in relation to the Alien and Sedition Act:

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are no more parties to the laws than they are parties to the Constitution; yet it will not be disputed that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.<sup>183</sup>

The government must obey the law just as its citizens must obey the law. Otherwise, we endanger our citizens abroad. We cannot expect other countries to give our citizens the protection of their laws, if we do not give their citizens the protection of our own. If our government does not abide by the law, it is hard-pressed to ask others to abide by it. The government loses its ability to govern because, as Justice Brennan and Justice Marshall concluded, “Lawlessness breeds lawlessness.”<sup>184</sup>

It is difficult for our nation to hold itself out as a bastion of liberty if we deny those applying for admission to our country the very liberty we hold so dear. We become the worst of hypocrites. We become blasphemers of our own civic faith, giving lip service to the Constitution while denying its existence in practice.

We must remember our history. We fought the War for Independence and framed our Constitution to create a society different from the one subject to the unlimited power wielded by the government in Britain. This is why we limited our government’s power<sup>185</sup> and reserved those powers not enumerated in the Constitution to the States or to the people.<sup>186</sup>

182. *Id.* at 284.

183. Madison’s Report on the Virginia Resolutions (1800), *reprinted in* 4 ELLIOT’S DEBATES 546, 556 (2d ed. 1836).

184. *Verdugo-Urquidez*, 494 U.S. at 285 (Brennan, J., and Marshall, J., dissenting), *reh’g denied*, 494 U.S. 1092 (1990).

185. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 182 (1967); *THE COMPLETE ANTI-FEDERALIST* 65 (H. Storing ed.,

The government does not give us our rights as a matter of grace. Our rights are self-evident and pre-date the Constitution.<sup>187</sup> They have always existed, and we are entitled to them for the simple reason that we are human beings. As President George Walker Bush stated in his last State of the Union Address, “The liberty we prize is not America’s gift to the world, it is God’s gift to humanity.”<sup>188</sup> Non-citizens, one would think, would be included in “humanity” and, therefore, entitled to “God’s gift” as much as citizens.

The government cannot give us rights we already have, but it will, most assuredly, attempt to take them away, and it will take them away from the weakest of us first—those who appear at our borders, who do not speak our language, who cannot vote, and who have no political power. If we do not speak out for the weakest among us, who will speak out for us?<sup>189</sup> It might be said that the Revolutionary War is still being fought. The problem is that it can still be lost.

## V. CONCLUSION

This is a fearful time in our history. September 11, 2001 has shown that we are not immune from attack and that we must be better prepared to meet attacks from our enemies. We must not, however, become captives of our fear, and fear should not control our immigration policy.

Someone once said, “Be careful what you hate because you become what you hate.” We should be on guard not to become terrorists in our war against terrorism. We should be careful not to project our faults onto people who are different from us out of fear. As St. Augustine once said, “Never fight evil as if it were something that arose totally outside of yourself.”<sup>190</sup> Once we

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1981).

186. U.S. CONST. amends. IX & X.

187. *Verdugo-Urquidez*, 494 U.S. at 288 (Brennan, J., and Marshall, J., dissenting), *reh’g denied*, 494 U.S. 1092 (1990).

188. George W. Bush, State of the Union Address (2003) *available at* [http://www.gomemphis.com/mca/nation\\_and\\_world/article/0,1426,MCA\\_454\\_1705877,00.html](http://www.gomemphis.com/mca/nation_and_world/article/0,1426,MCA_454_1705877,00.html) (last visited Feb. 17, 2003).

189. See Niemoller, *supra* note 1.

190. WILLIAM SLOAN COFFIN, *THE HEART IS A LITTLE TO THE LEFT* (1999).

know our shadow side and begin to control it, we can come closer to St. Augustine's rule.

*Zadvydas* and *St. Cyr*, despite their limitations, make the case for the constitutional protection of aliens. They move the pendulum of immigration law toward freedom and away from fear. Certainly, we should protect ourselves, but not at the price of losing precious constitutional rights.

Have courage. Be not afraid. We should be so confident in our form of government that we can escape from fear knowing that our Constitution and our government, acting with due process, will persevere while still being faithful to our civic covenant to exercise freedom, reason, and tolerance with one another. We should become more like "Yin" people and less like "Yang" people because, in the words of Chief Justice Warren:

It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the Nation worthwhile.<sup>191</sup>

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191. United States v. Robel, 389 U.S. 258, 264 (1967).